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A

COMPENDIUM

OF

The Law

OF

EVIDENCE.

By THOMAS PEAKE,

SERJEANT AT LAW.

FIFTH EDITION, WITH LARGE ADDITIONS.

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PREFACE

TO THE PRESENT EDITION.

THE following Work is now, for the fifth time, presented to the Profession. When originally published, the Author, as he then expressed, had in view a production which should be a companion on the circuit; always at hand, and ready for immediate reference. He, therefore, put it forth merely as a practical *Compendium*, and not as an elaborate and theoretical Treatise, which he was well aware would swell it to a size that would entirely destroy its utility. He has still kept the same object in view, but has at the same time endeavoured to include all the points which are likely to occur at *Nisi Prius*. Since the publication of the last Edition many new questions have occurred in the Courts at Westminster; and the Banbury and Berkeley Peerages, and the Queen's Case in the House of Lords, have not only explained many points which might have been before considered as doubtful, but have also raised and decided points which had never before occurred. These have all been introduced into the Work from time to time as they arose.

The Author has long been aware that the Index and Table of Contents of the former Editions were too general to afford that ready reference which the hurry of *Nisi Prius* so particularly requires. To remedy this defect an entire new Index and Table of Contents have been made, of such size and particularity, that it is confidently hoped no future inconvenience will be experienced on that account.

The paging of the second Edition has also been preserved by a figure in the margin; and although a very large quantity of new matter has been added in the present Edition, yet, by printing in a closer type, the Work has been brought into a smaller compass than the last Edition. To the younger student who may wish to read, this will probably be no inconvenience; and to those whose experience renders nothing more than an occasional reference necessary, the Author hopes that any small inconvenience which may be felt on account of the closeness of the letter, will be more than compensated by bringing the work into a portable size.

When the Author first turned his attention to the Law of Evidence, he was treading on almost new and unbroken ground; nothing but the unfinished publication of Lord C. B. Gilbert, and the little more than copy of it of Mr. Justice Buller, being before the Profession. Considerable differences of opinion had been entertained even by Judges on various

various points which had from time to time arisen, and therefore the Author deemed it necessary to insert, by way of Appendix, several Cases which were considered as leading ones on the subject. Most of those disputed points having now become settled law, the Author deems it no longer necessary to continue many of the Cases so published; and therefore has, in this respect, also considerably reduced the size of his book.

Temple,
1st January 1822.

TABLE OF CONTENTS.

PART I.

CHAP. I.

OF THE GENERAL RULES OF EVIDENCE.

1. THE proof lies on the party who alleges an affirmative, page 4.
Exception to this rule, 5.
2. The evidence must be confined to the issue, 6.
(See Part II. c. I.)
Character of parties when considered in issue, 6.
General or particular evidence of, ibid.
Opinions of the judges in the Queen's case, as to proof of conspiracy amongst witnesses, 7.
3. The best evidence required, 9.
When more than one witness, ibid.
When examination on oath dispensed with, 11.
Hearsay and general reputation, 12, 13, 14.
Entries by deceased persons, 14. 18.
Their dying declarations, 18.
Admissions of the party in the cause, 21.
of his wife—servant—agent or attorney, ibid.
Distinction between admission of by-gone transaction and *res gesta*, 22.
Offer of compromise, 23.
Confession of felon, 24.
Presumption of facts,
From acts of the party, 24.
From length of time, 29.
Rebutted by other circumstances, ibid.

CHAP. II.

OF WRITTEN EVIDENCE.

SECT. I.

Of Records.

1. Acts of Parliament,
Public, 30.
Private, ibid.
2. Judgments of superior courts,
Exemplifications of, 32.
Sworn copies, 33.
Office copies, 33, 34.
Secondary evidence of, ibid.
Effect of in civil cases, 37.—In criminal cases, 42.
3. Fines, and their proclamations, 35.
4. Deeds enrolled, ibid. (See Sect. IV. No. 4.)
5. Rules of court, ibid.
6. Depositions taken before a judge, 36.
7. Writs returned, 50.

SECT. II.

Of Public Writings not Records.

1. Journals of Parliament, 52.
2. Proceedings in Chancery,
Bill, 53.
Answer, ibid.
Depositions, 57.
Decree, 6.
3. Proceedings in ecclesiastical and admiralty courts, 67.
4. Proceedings in foreign courts, 6.
5. Proceedings in inferior courts, 72.
Award of arbitrators, 73.
6. Acts of state,
Gazette, 77.
Proclamation, ibid.
Articles of war, ibid.
7. Public books,
Register of Navy Office, 77.
Register of gaol, ibid.
Logbook of man of war, ibid.
Bank and East India books, 89.

8. General history, 79.
9. Of public surveys,
Doomsday, 82.
Survey of the ports, ibid.
Commissions and inquisitions, ibid.
10. Parish registers, 83.
11. Rolls of court baron, 85.
12. Terriers and maps, 86.
13. Pope's licence and bull, 87.
14. Corporation books, 88.

Sect. III.

Of the Inspection of public Writings.

1. Proceedings of courts of justice, 89.
2. Books of public offices, 90.
3. Corporation books, ibid.
4. Court rolls, ibid.

Sect. IV.

Of the proof of Deeds and other private Instruments.

1. Production of original, 93.
Dispensed with,
In case of loss, 94.
Proof of loss, ibid.
when in possession of adverse party, and notice given to produce, 94. 103.
Proof of notice, ibid.
2. Proof by subscribing witness, 95.
When dispensed with, 97.
3. Proof when there is no subscribing witness,
Hand-writing of party, 96.
Proof of,
Belief of witness, 98.
Comparison of hands, 100.
How far opinions of witnesses admissible, 102.
4. Deed or other instruments read without proof,
As coming out of the hands of adverse party, 105.

On account of its antiquity, 106.
What custody necessary to prove its authenticity, ibid.
As being recited in another deed, 107.
As having been enrolled, 108.
5. For and against whom evidence, and to what extent, 109.

SECT. V.

Of Evidence to explain written Documents.

1. General rule,
No written document to be *contradicted* by parol testimony, 110.
But may be shown to be void on account of fraud and misrepresentation, 111. 126.
2. Latent ambiguities explainable,
Two persons or things of the same name, 112.
Mistake in the name of a person, 113.
Land formerly one tenement divided, 114.
Not explainable so as to *enlarge* the grant,
Where there is sufficient to satisfy the words of the instrument according to one meaning, 114.
Lord Bacon's maxim on this point, ibid.
Decisions upon it,
Devise of estate *at* A. 115.
estate *of* B. ibid.
estate *in* C. ibid.
estate in A. which I purchased of B. 116.
Not explainable so as to *narrow* the grant,
Where there is sufficient description at first, but some unnecessary words added, 117.
Decisions upon this point,
Grant of tithes in the pariah of A. "all which are in the occupation of B." 118.
Devise of Trogue's farm, in "the occupation of B." 118.
Devise of all my Britton Ferry estate, described in a subsequent part of the will as situate in G. ibid.

3. Presumptive construction of law as to intention,
Controlled by parol evidence, 119.
Surplus of personal estate, ibid.
Fine levied without deed to lead uses, ibid.
Will supposed to be revoked by subsequent marriage and birth of child, 120. *Qu.* see 402.

4. Apparent or patent ambiguity,
In general not explainable.
Lord Bacon's maxim on this point, 120.
Observations thereon, ibid.
Instances of explanations received,
In mercantile instruments, 121.
Consideration of deed taking effect under statute of uses, ibid.
Presentation, with blank left for name of patron in bishop's register, ibid.
Ambiguous words in ancient instruments, 122.
Instances of explanations refused,
To add to contract, which by statute of frauds must be in writing, 121.
To fill up blank for name of devisee, ibid.
To explain meaning of covenants by subsequent act of the parties, 124.

CHAP. III.

OF PAROL EVIDENCE.

SECT. I.

Persons incompetent to give Evidence by reason of the imbecility of their Understandings.

1. Idiots, 127.
2. Lunatics, ibid.
3. Children, ibid.
4. Deaf and dumb persons, ibid.

SECT. II.

Persons incompetent or incredible by reason of the infamy of their Characters or religious Opinions.

1. Persons competent though not worthy of credit,
Accomplices, 136.
Persons who have before sworn differently, ibid.
Persons of bad character though not convicted of crime 129.
How their characters may be attacked, ibid.
By whom, 130.
When on cross-examination of themselves, 133.
By the testimony of others, 129. 135.
2. Persons wholly incompetent,
Those convicted of certain crimes, 129.
What crimes incapacitate, 130.
How conviction to be shown, 131, 132.
By what means competency restored, 131.
3. Religious opinions of witness,
How far it affects his competency or credit, 137.
How it shall affect the mode of swearing, 139.

SECT. III.

Persons incompetent by reason of interest in the event of the cause.

General rule,
Must be directly interested, or the verdict evidence for or against him in another action, 141.
Instances of persons not so interested,
Person indicted for same offence as prisoner, 141.
Wife of man under sentence for same offence, ibid.
Person defrauded on an indictment for fraud, 143.
Indictment for forgery an exception to this rule, 144. Digest (D.) 164.
Corporators, on questions relating to corporations at large, and who have no individual rights, dependant on the question, 145.
Exceptions to the general rule,
1. Persons having only a nominal or formal interest, 145.

Trustees, guardians or executors, 151.
Defendant in a cause against whom there is no evidence, 148.
Or who has suffered judgment by default, ibid.
2. From necessity, where there can be no other witnesses,
Plaintiff in his own cause on the stat. of Winton, 146.
Hundredors for the defendant in the like case, ibid.
The evidence of the defendant in an action for malicious prosecution, on the criminal inquiry, 147.
Porters, factors and servants, ibid. Digest (A.) pl. 8; (B.) pl. 1, 2, 3, 4, 5, 6. 13; (F.) pl. 2.
3. Persons standing indifferent between the parties, 149.
Party to a bill of exchange in an action against another party, 150.—other instances, Digest (B.) pl. 5.
Balance of interest not nicely weighed, 150.
4. Persons claiming rights who have none in reality, 151.
5. Persons acquiring interest by their own act after event, 152.
Removal of interest,
By release to or from the witness, 153.
Statute as to witnesses to wills, 156.
Digest of cases as to the interest of witnesses,
(A.) In what cases corporators and others are witnesses on public questions, 156.
(B.) Servants and agents, 160.
(C.) Witnesses in cases of bankruptcy and insolvency, 163.
(D.) Witnesses on indictments for forgery, 164.
(E.) Persons who are answerable, or have themselves contracted, 166.
(F.) Persons themselves liable charging others, or coming to claim property in themselves, 168.

Sect. IV.

Persons incompetent by reason of their relation to the Parties, or acts done by them.

Who are excluded,
1. Husband and wife for or against each other, 169.
Woman who has passed as such, though not legally married; *qu.* vide *Campbell* v. *Twemlow*, Addenda.

2. Counsel, solicitor or attorney, 172.
What cases not within this rule, 173
Who not,
Physician, surgeon or clergyman, 173.
Persons who have executed instruments, 176.
Husband or wife, to deny their marriage, 177.

SECT. V.

Persons privileged from Examination

No one compellable to charge himself with crime, 178.
Aliter in the case of a civil debt, 179.
Statute on this subject, 180.

SECT. VI.

Of the examination of Witnesses.

On the *voir dire*, 182.
In chief, 183.
Reference to writing in aid of memory, 195.
As to opinion in matters of science, ibid.
Cross-examination, 184.
As to papers written by himself, 185.
Opinions of the judges in the Queen's case on this point, ibid.
As to the mode of putting questions as to representation of witness, 189.
Necessary to lay ground for contradiction, 191.
Opinion of the judges in the Queen's case on this point, ibid.
Re-examination, 195.

SECT. VII.

Of procuring the attendance of Witnesses, and their Privileges.

Effect of *subpœna*, 196.
habeas corpus, 198.
Pecuniary allowance to, 197.
Protection from arrest, 199

PART II.

CHAP. I.

OF EVIDENCE IN GENERAL, AS REGULATED BY THE PLEADINGS OR OTHER PROCEEDINGS IN A CAUSE, 200.

WHAT shall be deemed a variance between the statement and the evidence,

1. In circumstances, 201.

Not the want of proof of impertinent allegation, 201.

As the *scienter* in a warranty, ibid.

Aliter, if merely unnecessary, ibid.

As the days whereon rent is payable, ibid.

Or the description of record, 202.

Contracts must be truly stated, 203.

As the loan in an action for usury, ibid.

So must custom, 204.

In some cases the custom of A. will be evidence of the like custom in B. 204.

So the general mode of fishing in a river, ibid.

On *liberum tenementum*, as to a right in a particular part of a waste,

Acts of ownership in other parts of the waste may be given in evidence, 204.

So where manor encircled by one belt of trees, ibid.

Action for arresting plaintiff,

The acts of third persons engaged in a riot on the same occasion, 204.

2. In time. When material, 203.

3. In place,

Distinction between local and transitory actions, 205.

Place immaterial when merely alleged as *venue*, ibid.

Venue changed by motion, 206.

Undertaking to give material evidence, 207.

4. Particulars of demands under judge's order,
How far they restrain the general allegation of the declaration, 208.
5. Rule to pay money into court,
Effect thereof, as an admission by the defendant, 209.
6. Plea of tender,
Effect thereof as an admission by defendant, 210.
7. Pleas in abatement,
In what cases pleadable, and evidence thereon, 211.
Distinction between actions of *tort* and contract, 212.

CHAP. II.

OF THE EVIDENCE IN THE ACTION OF ASSUMPSIT.

SECT. I.

In actions on written contracts, 215.
Stamp-duties on agreements, ibid.
when paper may be re-stamped, 220.
Provisions of the statute of frauds, and cases upon it,
1. As to promise to pay debt of another, 221, 222.
2. Purchase of interest in land, 221. 224. 228.
3. Promise in consideration of marriage, ibid.
4. As to contract not to be performed within a year, 221. 225.
5. For sale of goods of value of 10 *l.* 221. 227.
In what form the writing must be, 228.
In actions on bills of exchange and promissory notes, 231.
Stamp duties, ibid.
Action by payer against acceptor, 232.
effect of special acceptance, ibid. See statute 1 & 2 Geo. 4. Addenda.
by endorsee against acceptor, 233.
against drawer, 234.
drawer against acceptor, ibid.
Protest, when evidence, ibid.
Notice to one of several partners, ibid.
In actions on policies of assurance, 235.
In actions between vendors of lands and goods,
For refusing to complete agreement, 236.
On a warranty, 241.

In actions between vendor and vendee of stock, or by lender against borrower thereof, 243.

SECT. II.

Of the Evidence in Actions on parol and implied Promises.

In actions for goods sold and delivered, and work and labour, 245.
Delivery to carrier, 246.
to wife or servant, 247.
In action for money paid to defendant's use,
On contract, 249.
On default of defendant, 250.
Between surety and principal, 251.
In action for money lent, 252.
In action on account stated, 253.
In action for use and occupation, 254.
Proof of occupation, 255.
Where there is agreement in writing, 257.
Cases as to what shall be deemed a lease and what an agreement, 258.
Defendant's evidence,
How far he may dispute landlord's title, 259.
In action for mismanagement of farm, 260.
In action on an attorney's bill, 261.

SECT. III.

Of the Evidence on the part of the Defendant, and the Plaintiff's Evidence on particular Issues.

General issue,
Want of consideration, 263.
Work badly done, ibid.
Differences of opinion on this subject, 268.
Statute of limitations, 271.
Tender, 275.
Infancy, 277.
Coverture, 279.

CHAP. III.

OF THE EVIDENCE IN THE ACTION OF COVENANT.

On *non est factum*, 281.
In an action by assignee of reversion or term, 283.
Title, when set out, and how proved, ibid.
Who chargeable as such, 284.
Assignees of bankrupt, when, 285.

CHAP. IV.

OF THE EVIDENCE IN THE ACTION OF DEBT.

SECT. I.

On specialties,
On *non est factum*, 286.—Vide *ante*, Chap. 3.
On plea of payment, 287.
On assessment of damages under stat. Wm. 3, 286.

SECT. II.

On simple contracts,
On nil debet, 288.

CHAP. V.

OF THE EVIDENCE IN ACTIONS ON STATUTES.

SECT. I.

Penal,
Commission of offence, 289.
Commencement of action, 290.
Qualification or excuse, 289.
How far a colourable title sufficient, 291.

SECT. II.

Remedial,
General principles, 292.
In action for double rent, 293.
In action on stat. of hue and cry,
Time and place of robbery, 295.
Notice to inhabitant, 296.

Notice to constable, 296.
Notice in gazette, ibid.
Affidavit, 297.
Bond for costs, 299.
In action on the riot and other acts in *pari materia*, ibid.

CHAP. VI.

OF THE EVIDENCE IN ACTIONS ON THE CASE.

General observations, 302.

SECT. I.

Actions founded in malice or fraud.

1. Slander,
Plaintiff's evidence,
Allegations to be proved, 303.
Words as laid, ibid.
Other words in aggravation, 304.
Special damage, ibid.
Publication of libel, ibid.
Stat. 38 Geo. 3, as to newspapers, ibid.
Libel in foreign language, 307.
Defendant's evidence,
In defence of action,
Innocent publisher,
Without knowledge, 307.
Reporter of trial, ibid.
of resolutions of parliament, ibid.
Promulgation of sentence, ibid.
Character given servants, &c. ibid.
Other confidential communications, ibid.
Words spoken in parliament, 308.
But he cannot publish, ibid.
Justification of the truth of words or libel,
Evidence confined to particular facts pleaded, 308.
In mitigation of damages,
Ill conduct of plaintiff, 308.
His general bad character, ibid.

2. Malicious prosecution,
Prosecution at an end, 309.
Defendant the prosecutor, ibid.
Want of probable cause, ibid.
3. Malicious arrest, 310.
4. False character of tradesman or servant, 311.

SECT. II.

Actions founded in negligence.

1. For keeping a noxious animal, 312.
2. Laying obstruction in a highway, 314.
3. Running foul of carriage or ship, 315.

SECT. III.

Actions for disturbance of Easements.

Plaintiff's evidence,
Length of enjoyment, 315.
To the extent claimed, 316. 318.
In what cases reputation received, 317.
Extent of injury immaterial, ibid.
Defendant's evidence,
Twenty years *non user*, 317.
Occasional obstruction, 318.
Leave asked and given, ibid.

CHAP. VII.

OF THE EVIDENCE IN THE ACTION OF TROVER.

Plaintiff's evidence,
Absolute property and right to possession, 320.
Special property and actual possession, ibid.
Conversion, actual, or refusal on demand, 321.
Defendant's evidence,
Property in another whom defendant represents, 321.
Lien, ibid.
Accidental loss, ibid.
Defendant, joint-tenant with plaintiff, ibid.
Another joint-tenant with plaintiff, ibid.
Statute of limitations, ibid.

CHAP. VIII.

OF THE EVIDENCE IN ACTIONS OF TRESSPASS AND REPLEVIN.

Plaintiff's evidence,
Commission of tresspass by defendant, 322.
Aiding others to do so, 323.
On one or more days as laid, ibid.
In the manner stated in declaration, ibid.
What evidence under *alia enormia*, ibid.
on new assignment, 326.
Defendant's evidence,
Liberum Tenementum, 325.
Easement by prescription or grant, ibid.
Evidence of lost grant, ibid.

CHAP. IX.

OF THE EVIDENCE IN THE ACTION OF EJECTMENT.

SECT. I.

Plaintiff's evidence in general.

Right of entry within twenty years, 327. 330.
A disability within statute, 332.
Actual entry,
In what cases necessary, 328, 329. 333.
Proof of, 329.
Commencement of action, 336.
Actual ouster—evidence of, 331.
When necessary as part of plaintiff's proof, 334.
Defendant's possession—now admitted, 334.

SECT. II.

Defendant's evidence in general.

Outstanding term, 336.
When surrender presumed, ibid.
Who may set it up, 338.
Twenty years adverse possession, 327. 330, 331. *Vide supra*, Sect. I.

SECT. III.

In Ejectment by Landlord against Tenant.

1. On notice to quit,
Demise, 338.
Notice to quit, 340.
Terms of, 342.
To whom and by whom given, ibid.
Waived by disclaimer, 343.
Waived by lessor of plaintiff, ibid.
Mesne profits under stat. 1 Geo. 4, 344.
2. On forfeiture of lease,
On the stat. 4 Geo. 2, where no sufficient distress, 345.
At the common law, 346.
What act will amount to a waiver, 347.

SECT. IV.

In Ejectment by Creditors who have a Lien on the Land.

Mortgagee, 347.
Tenant by *elegit*, 348.
statute merchant, ibid.

CHAP. X.

OF THE EVIDENCE IN THE ACTION FOR MESNE PROFITS.

Judgment and execution in ejectment, 349, 350.
Title before judgment, 350.
May be controverted by defendant, ibid.
Or fine shown without entry to avoid, 351.

CHAP. XI.

OF THE EVIDENCE IN THE ACTION BY AND AGAINST HUSBAND AND WIFE, OR BY HUSBAND, PARENT, OR MASTER.

SECT. I.

In the Action by and against Husband and Wife, 351.

SECT. II.

In the Action by Husband alone.

1. Criminal conversation,
Plaintiff's evidence,
Marriage of parties, 352.

Terms on which they lived, 353.
Loss of fortune, ibid.
Defendant's evidence,
Loose conduct of wife, 353.
Misconduct of husband, ibid.
2. Action for harbouring wife,
Conduct of the parties, 354.
Representation of wife, ibid.

SECT. III.

In Action by a Parent or Master.

1. Seduction, or other assault,
General evidence of service, 355.
Servant a witness, ibid.
Conduct of the servant or plaintiff, ibid.
2. Harbouring apprentice or servant,
Knowledge of defendant, 355, 356.

CHAP. XII.

OF THE EVIDENCE IN CASES OF BANKRUPTCY.

Who are witnesses, *vide ante*, Part I. c. 3, s. 3, Digest, letter (C.)

SECT. I.

In Actions by and against the Assignees.

In what cases assignees must prove bankruptcy, 356. 360.
Proof of—trading, 357.
Description in commission, 357.
Petitioning creditor's debt, ibid.
Where an executor, ibid.
Where assignee of former bankrupt, 358.
Act of bankruptcy, 357.
What declaration of bankrupt evidence, ibid.
Dispensed with,
By acts of the parties, 358,
By not giving notice, ibid.
But may still be controverted, 359.

Assignment, 358.
Where an assignee has been removed, ibid.
Bargain and sale, 359.
Operates only from enrolment, 360.

SECT. II.

In Actions by and against the Bankrupt.

1. Action by bankrupt against messenger or assignees, 360.
2. Action against bankrupt,
Certificate, 361.
Avoided for fraud, &c. ibid.
by proof of fictitious debt, 364.
former commission, ibid.
subsequent promise, 366.

CHAP. XIII.

OF THE EVIDENCE IN ACTIONS BY AND AGAINST AN EXECUTOR OR ADMINISTRATOR.

SECT. I.

In Actions by an Executor or Administrator.

Proof of probate or administration, when necessary, 367.
How proved, 367, 368, 369.
How avoided, ibid.
Count, stating promise to executor, when necessary, 368.

SECT. II.

In Actions against an Executor or Administrator.

1. On plea of *ne unques* executor, 368.
Evidence of being executor *de son tort*, 369.
2. On *plene administravit*,
Plaintiff's evidence,
Possession of goods, 370.
Laches in not collecting debts, ibid.
What effects deemed assets, 371.
Defendant's evidence,
Payment of debts of equal degree, and funeral charges, 371, 372.
What proof required, 372.

Effect of judgment not docketted, 371. 373.
Delivery over to rightful executor, 372.
But not to co-executor, 373.
Retainer, ibid.
3. On plea of specialty debts, outstanding,
Plaintiff's evidence,
Judgment not docketted, 373.
Bond for less sum, 373, 374.
When replication *per fraudem* necessary, ibid.
4. In an action suggesting a *devastavit*, 375.

CHAP. XIV.

OF THE EVIDENCE IN ACTIONS BY AND AGAINST HEIRS AND DEVISEES.

SECT. I.

Proof of Title by Heir.

1. Seisin of ancestor, 377.
When possession not evidence of, ibid.
2. Death of ancestor, 379.
Presumption as to death, ibid.
3. His own relationship, 377.
Reputation, &c. ibid.
When presumption of access rebutted, 380.
Time of birth of posthumous child, 381.
Father and mother witnesses, 382.
When their declarations are evidence, ibid.

SECT. II.

Proof of Title by Devisee.

Provision of statute of frauds as to wills, 382.
To what cases it extends, ibid.
Signing by the testator, 383.
Publication by testator, ibid.
Attestation by witnesses, 384.
Need not be in each other's presence, ibid.

But must be in that of the testator, 390.
What deemed such, ibid.
And they must all attest the same paper, 386.
What deemed such, 387, 388.
Witnesses must be credible, 391.
Formal proof of will, when not disputed, 391.

SECT. III.

Of Evidence by the Heir to defeat the Will, and by Devisee to show Republication.

1. Forgery, 393.
2. Insanity, ibid.
Observations of Lord Thurlow on these cases, 395.
Of other judges, 396.
3. Revocation,
Provision of the statute of frauds, 398.
By a new will,
Must be proved as such, 399.
By writing, not being itself a will, ibid.
By cancelling,
Must be done *animo revocandi*, 400.
And the act completed, ibid.
Unless prevented by a third person, 401.
By legal implication,
Subsequent marriage, and birth of child, ibid.
Quære, If parol evidence of intention admissible to rebut presumption, 402.
4. Republication,
Evidence of, 405.
Its effect on lands mentioned in the will, and those subsequently acquired, ibid.

SECT. IV.

Of the Evidence in an Action against an Heir or Devisee on the Specialty of his Ancestor or Testator.

On plea of *riens per discent*, generally, 406.
On the plea of *riens per discent* at commencement of action, 408.
In action against heir and devisees jointly, 411.

CHAP. XV.

OF THE EVIDENCE IN ACTIONS AGAINST OFFICERS OF JUSTICE.

SECT. I.

Against Sheriffs Bailiffs and Gaolers.

Against bailiff, 411.
Against sheriff, ibid.
Proof of warrant, 412.
Cases in which secondary evidence admitted, ibid.
Proof by defendant of fraudulent assignment to protect goods against execution, 413.
What assignment deemed fraudulent,
Statute of Elizabeth, 413.
Cases upon it,
Twine's case, 414.
Cases where possession of grantor not considered as fraudulent, ibid.
Goods purchased with the money for which they are pledged, ibid.
Goods purchased of sheriff under execution, and lent to original owner, 415.
Goods publicly bought under assignment for benefit of creditors, and so lent, 416.
Cases of fair preference if one creditor, 417.
1. Action against sheriff or bailiff for extortion, ibid.
2. For false return of mesne process, 418.
3. Escape on mesne process, 419.
4. False return of *fieri facias*, 420.
5. Escape of debtor in execution, 421.
Provisions of the statutes, ibid.
Evidence of custody, 421, 422.
of escape, 423.
Pleas, and evidence thereon, ibid.
6. Taking insufficient sureties in replevin, 424.
Provisions of the statute, 424.
Sheriff, under-sheriff and replevin clerk, all liable, 425.

Either avowant or person making cognizance may maintain the action, 425.
Evidence of want of responsibility, ibid.
To what extent sheriff liable, ibid.
7. For selling without paying the landlord's rent, 426.

SECT. II.

Against Justices, Constables, Parish Officers and Revenue Officers.

1. The statutes as to justices, constables and parish officers,
21 Jac. 1, action to be in proper county, 427.
7 Jac. 1, the whole case in evidence on general issue, ibid.
42 Geo. 3, extending those statutes to all persons holding public employment, ibid.
24 Geo. 2, notice to be given to justice previous to the commencement of an action, ibid.
and warrant demanded of constable, 428.
Action to be brought within six months, ibid.
43 Geo. 3, in actions against justices on account of conviction which has been quashed, plaintiff to recover no more than 2*d.* unless malice and want of probable cause, 429.
And justice may prove the offence, ibid.
2. Statutes as to officers of excise and customs,
23 Geo. 3, 24 Geo. 3, } 430.
3. Construction of the several statutes,
In what cases justice, &c. entitled to notice, 430. 432.
In what cases constable entitled to demand of warrant, 431.
Action against him limited to six months in all cases, 432.
And may always be answered by showing he has delivered copy of warrant before action brought, 428.
The form of notice required, 432.
Proof of action being commenced within time, 433.
4. Defendant's evidence,
Plaintiff guilty, 434.
Conviction, ibid.
When it may be drawn up, 435.

Not a defence if the justice had no jurisdiction, 435.
In cases within stat. 43 Geo. 3, no evidence admitted of facts, not in proof before justice; and he may prove the evidence before him to show probable cause, 429. 434.
This statute extended to cases of corporal punishments, 430.
Tender of amends, 435.

CHAP. XVI.

OF THE EVIDENCE IN ACTIONS BY AND AGAINST ECCLESIASTICAL PERSONS.

SECT. I.

In actions by the Patron or Parson to try the Title to, or obtain possession of, the Church.

1. *Quare impedit*, 436.
2. Ejectment, 440.

SECT. II.

In Actions for Tithes.

1. On composition, 440.
2. On statute of Edw. 6, for not setting out, 441.
Value to entitle plaintiff to costs, ibid.
Proof of plaintiff's title, ibid.
Determination of composition, 442.
Defendant's evidence,
Proof of *modus*, 443.
Effect of documents in those cases, 444.
Of discharge by bull, 445.
by prescription, ibid.
by composition real, ibid.
by order, 446.
by unity of possession, ibid.
by reason of barrenness, 447.

SECT. III.

In the Action for Dilapidations, 448.

SECT. IV.

In the Action for Non-residence.

Statutes, 21 Hen. 8, 449.
25 Hen. 8, ibid.
33 Hen. 8, ibid.
43 Geo. 3, 450.
48 Geo. 3, 456.
57 Geo. 3, 450.

Provisions of,
Time of absence, 450. 452.
Who within the statutes, 451.
Place of residence, 451, 452.
Licence of absence, ibid.
Notice of action, 454.
Payment of money into court, ibid.

Proof of benefice, ibid,
of absence, 455.
Value of living, ibid.
Licence to absent himself, ibid.
Exemption, 456.

CHAP. XVII.

OF THE EVIDENCE IN COPYHOLD CASES.

Admittance,
Not necessary by heir-at-law, 456.
Nor by person in remainder, ibid.
But devisee must prove it, ibid.
And cannot devise without it, ibid.

Surrender,
In case of will now unnecessary, 457.
Who may make it, ibid.

Will of copyholder,
Not within statute of frauds, 457.
Any writing sufficient, ibid.
Proof of, 458.

Ejectment by lord for forfeiture, 459.
pro defectu tenentis, 460.
Action by him for fine, 461.
Proof of Custom,
Rolls of Manor, 460.
Books of steward, ibid.
Reputation, ibid.
That lands descend to the eldest female heir, 461.
That estates tail may be barred by surrender, ibid.

TABLE

OF

CASES CITED.

A.

ABBOT *v.* Plumbe, 95. 356
Abeney *v.* Dickenson, 89
Abrahams *v.* Bunn, 144. 182
Ackworth *v.* Kempe, 413
Adams *v.* Kerr, 97, 98
v. Hewett, 443
Addy *v.* Grix, 384
Adderley *v.* Hundred of Offlow North, 301
Alban *v.* Pritchet, 21
Alexander *v.* Comber, 226
v. Gibson, 130
v. M'Cawley, 418
Allen *v.* Dundas, 68
v. Heber, 408
Allesbrook *v.* Roach, 101
Alpass *v.* Watkins, 238
Also *v.* Bowtrel, 381
Alsop *v.* Eyles, 424
v. Price, 360
Alves *v.* Hodgson, 229
Altham *v.* Earl of Anglesea, 119
Ambrose *v.* Clendon, 163. 357
Amey *v.* Long, 197
Anderson *v.* Hayman, 222
v. May, 104. 261
Anscomb *v.* Shore, 160
Ansell *v.* Waterhouse, 212
Antram *v.* Chase, 73
Argent *v.* Darrant, 325
Armory *v.* Delamirie, 321
Arundel *v.* White, 72
Arundel's (Lord) Case, 15.
Ashcomb *v.* Hundred of Spelhome, 321
v. Hundred of Elthorn, 298
Ashpole's Case, 295
Astlin *v.* Parkin, 350
Atcheson *v.* Everett, 140
Atherfold *v.* Beard, 90
Atkins *v.* Hutton, 86
Atkinson *v.* Matteson, 419.
Attorney General *v.* Barnes, 387. 404.
v. Bowman, 7
v. Le Marchant, 103
v. Parke, 132
v. Parnther, 429.
Aubert *v.* Mace, 252
v. Walsh, 253
Averill *v.* Holmes, 284
Avison *v.* Lord Kinnaird, 23
Auncelme *v.* Auncelme, 456

B.

Backhouse *v.* Middleton, 73
Badkin *v.* Powell, 324
Baglehole *v.* Waters, 242
Bain *v.* Hargrave, 179
Baker *v.* Lord Fairfax, 58
Balcetti *v.* Serani, 100
Baldwin *v.* Cole, 321

Baldwin *v.* Trudge, 90
Ball *v.* Bostock, 161
v. Hundred of Wymersley, 296
v. Sibbs, 255
Ballard *v.* Dyson, 318
Ballis *v.* Attorney General, 121
Banbury Peerage, 13. 63. 380
Bank of England *v.* Morris, 374
Bannister *v.* Usborne, 254
Barker *v.* Dixie, 171
Baring *v.* Roy, 69
Barlow *v.* Vowell, 153
Barnard *v.* Moss, 441
Barnes *v.* Messinger, 441
v. Holloway, 304
v. Trompowsky, 97
Barrow *v.* Humphrey, 197
Barry *v.* Bebbington, 14. 204
Bartlet *v.* Emery, 279
v. Pickersgill, 46. 143. 144
Baskerville *v.* Hundred of Agbridge, 295
Baston *v.* Butter, 264
Bateman *v.* Bailey, 384
v. Phillip, 215, 229
Bates *v.* Jenkinson, 94, 291
Bateson *v.* Hartsink, 363, 364, 365
Bath (Earl of,) *v.* Battersea, 54
v. Montague, 141
Bauerman *v.* Radenius, 20. 22
Baynham *v.* Guy's Hospital, 124
Bealey *v.* Shaw, 315
Beard *v.* Boulcot, 251
Beardmore *v.* Sill, 322
Beasley *v.* Magrath, 54
Beebee *v.* Parker, 461
Beckwith *v.* Wood, 291
Bedel *v.* Beard, 26
Bell *v.* Harwood, 166
Benjamin *v.* Porteus, 160
Bennet *v.* Hundred of Hertford, 146
Bennett *v.* Alcott, 355
Benson *v.* Olive, 58
v. Port, 92
Bent *v.* Baker, 141. 153. 176
Bentley *v.* Cook, 172
v. Griffin, 248
Benton *v.* Enablers, 225
v. Sutton, 423
Berkeley Peerage, 13
Bermon *v.* Woodbridge, 57
Berrington *v.* Parkhurst, 328, 329
Berryman *v.* Wise, 303
Bertie *v.* Beaumont, 101
Berry *v.* Banner, 42
Besford *v.* Saunders, 366
Best *v.* Moravia, 50
v. Wilding, 31
Bettison *v.* Bromley, 151, 155
Bevan *v.* Williams, 24, 454
Bibb dem. Mole *v.* Thomas, 402
Bickerdike *v.* Bollman, 234
Biggs *v.* Lawrence, 32
Bill *v.* Oakley, 431
Birch *v.* Bishop of Litchfield and Coventry, 437
v. Wright, 256. 348
Bird *v.* Appleton, 70
v. Blosse, 228
v. Hund. of Ossulston, 298
Birt *v.* Barlow, 84, 352
v. Kershaw, 150. 161
Bishop *v.* Chichester, 442, 443
Black *v.* Smith, 276
Blackett *v.* Lowes, 17, 28
Blackhouse *v.* Middleton, 66
Black *v.* Smith, 276
Blake *v.* Lawrence, 208
Bland *v.* Ansley, 168
v. Swafford, 197
Blankley *v.* Winstanley, 123
Blatch *v.* Archer, 412. 419. 421
Blatcher *v.* Kemp, 431
Bliss *v.* Palmer, 278
Blower *v.* Ketchmore, 66
Bloxham *v.* Hubbard, 212. 358
Bolton *v.* Gladstone, 69
Bonafous *v.* Walker, 423
Bond *v.* Seawell, 389
Boot *v.* Wilson, 255
Booth *v.* Charlton, 355
Boothman *v.* Earl of Surrey, 423
Bordenave *v.* Gregory, 224
Borthwick *v.* Carruthers, 277
Botham *v.* Swingler, 183
Boulton *v.* Prentice, 248
Bourdillon *v.* Dalton, 285
Bowcher *v.* Noidstrom, 315
Bowles *v.* Langworthy, 93
Bowman *v.* Nicholl, 219
Bowsher *v.* Cully, 22
Bowyer *v.* Bampton, 233
v. Rivett, 406

Boydell v. Drummond, 225. 229
Bradbury v. Grinsell, 318
Doe dem. Bradford (Lord) v. Watkins, 340
Bradley v. Wyndham, 420
Brady v. Cubit, 120
Bramwell v. Alt, 238
Brandram v. Wharton, 273
Brazier's Case, 128
Bredon v. Harman, 292
Brett v. Levett, 234. 357
Bretton v. Cope, 89. 96
Brewer v. Palmer, 257
Bridges v. Duke of Chandos, 27
v. Francis 262
Bridgman v. Jennings, 87
Briggs v. Crick, 166
v. Evelyn, 432
Bristow v. Wright, 201
v. Hayward, 310
Brittain v. Kinnaird, 434
Brocas v. Mayor, &c. of London, 97.
Brock v. Copeland, 313
Brockman's Case, 54. 57
Broderick v. Broderick, 390
Bromley v. Wallace 353
Bromwich's Case, 61
Brookbard v. Woodley, 100
Brooks v. Mason, 261
Broom v. Davis, 264
v. Robinson, 285
Broughton v. Harper, 172
Brounker (Lord) v. Sir R. Atkyns, 79
Brown v. Brown, 148
v. Corporation of London, 150
Brown v. Hodges, 322
v. M'Kinnally, 38
v. Selwin, 123
v. Turner, 252
Brownson v. Avery, 160
Brumster v. Sewell, 94
Bryam v. Booth, 66
v. Horseman, 273
Buchanan v. Rucker, 72
Bucher v. Jarrat, 165
Buckland v. Tankard, 169
Buckler v. Millerd, 111
Buckley v. Nightingale, 409
v. Taylor, 426
Buckmaster v. Harrop, 228
Budd v. Birkenhead, 273
Budd v. Randall, 37
Buddle v. Wilson, 212
Bulford v. Croke, 5
Bullen v. Mitchell, 86
Bullock v. Dodds, 132
Bund v. Bacon, 150
Buntin's Case, 75
Burdon v. Browning, 46
Burdett v. Colman, 205
Burrows v. Jemino, 69
Burleigh v. Stibbs, 93
Burley v. Bethune, 429
Burns v. Mawson, 460
Burroughs v. Wright, 300
Burton v. Burchall, 167
v. Chatterton, 262
v. Hinde, 158.
Burtonshaw v. Gilbert, 401 405
Busby v. Greenslate, 166
Bush v. Rawlins. 168
Butler v. Cooke, 164.
Butcher v. Butcher, 110
Butterfield v. Forrester, 314
Button v. Prettiman, 145
Buxton v. Bedel, 218
Byne v. Moore, 310

C.

Calconel v. Briggs, 244
Calcraft v. Gibbs, 291
Call (Bart.) v. Dunning, 95
Calliaud v. Champion, 207
Calvert v. Bovel, 70
Calvin's Case, 138
Campbell v. Lewis, 285
v. Wilson, 318. 325
Canning v. Newman, 455
Cannon v. Brice, 252
Carlton d. Griffin v. Griffin, 388
Carlisle (Mayor of) v. Blamire, 285
Carlisle v. Trears, 203
Carpenters (Company) v. Hayward, 159.
Carter v. Muscot, 319
v. Pearce, 167
v. Thomas, 147
Cartwright v. Cartwright, 396
Carwick v. Blagrave, 283
Cary v. Askew, 457
v. Garrish, 253
v. Pitt, 99. 102
Cass v. Cameron, 168

Casson v. Dade, 390
Castle v. Bambridge, 140
Castle v. Burdett, 430.
Castling v. Aubert, 223
Caswell v. Coare, 242
Cates v. Winter, 103
Cathcart v. Blackwood, 361
Catling v. Skoulding, 290
Cator v. Stokes, 61
Cazenove v. Vaughan, 65
Chamberlain v. Porter, 231
Chambers v. Caulfield, 354
v. Griffiths, 237
v. Jones, 424
Champion v. Plummer, 229
Chamire v. Clings, 350
Chandler v. Hund. of Sunning, 297
v. Roberts, 72
Chaplin v. Rogers, 227
Chapman v. Cowlan, 85
v. Gardner, 168
v. Pointon, 197
Charaund v. Angerstein, 196
Chater v. Becket, 223
v. Hawkins, 131
Chatfield v. Fryer, 446
Chattle v. Pound, 107
Chelsea Water Works (Governor and Company of) v. Cowper, 106
Cheney's Case, 112
Chichester v. Phillips, 68
Child v. Morley, 268
Chippingdale v. Brigden, 421
Chopping q. t. v. Carter, 289
Christie v. Secretan, 69
Christopher v. Christopher, 402
Clancey's Case, 131
Clarke v. Donovan, 262
v. Gray, 210
v. Shee, 160
v. Smith, 408
v. Bradshaw, 273
Clarkson v. Hanway, 126
v. Woodhouse, 110
Clayton v. Andrews, 224
v. Nelson, 309
Clegg v. Levy, 72
Clerk v. Bedford, 18.
Cleverley v. Brett, 370
Clewes v. Bathurst, 75
Clutterbuck v. Lord Huntingtower, 167
Cobb v. Car, 147
Cobb v. Stokes, 293
Cobden v. Kenrick, 175
Cock v. Wartham, 102
Cockerill v. Chamberlain, 207
Coghlan v. Williamson, 97
Cohen v. Templer, 385
Coker v. Farewell, 59
Cole v. Blake, 276
v. Parkin, 219
Coleman v. Winch, 408
Collins v. Jacobs, 207
v. Nicholson, 262
Colsel v. Budd, 28
Coles v. Bell, 277
v. Trecothick, 228
Compagnon v. Martin, 303
Compere v. Hicks, 350, 351
Compton v. Richards, 317
Cooke v. Booth, 124
Cooke's Case, 262
Cooke v. Lloyd, 85
v. Loxley, 25. 259
v. Ludlow, 247
v. Sholl, 48
Cooper v. Chitty, 421
v. Elton, 228
v. Hund. of Basingstoke, 295
v. Marsden, 18
v. Smith, 78. 212. 229
Cope v. Bedford, 87
Copeland v. Stevens, 256
Coppin v. Carter, 289
Corbet's Case, 370
Corbet v. Poelnitz, 280
Cork v. Baker, 225
Corporation of London (Case of) 145. 156
Corson v. Dubois, 365
Cotes v. Haris, 272
Cowell v. Edwards, 251
Cowen v. Abrahams, 104
Cragg v. Norfolk, 107
Cranch v. Kirkman, 271
Cripps v. Durden, 435
Critchlow v. Parry, 234
Crocker's Case, 165
Croft v. Paulet, 392
Croke v. Dowling, 310
Cromack v. Heathcote, 174
Crompton v. Minshull, 343
Crosby v. Percy, 97
v. Wadsworth, 224

Crosse v. Smith, 373
Cunliffe and Wife v. Sefton, 98
Cunliff v. Taylor, 83
Curry v. Edensor, 217
v. Walter, 307
Curteis v. Fitzpatrick, 28
Curtis v. Vernon, 372
Cutting v. Darby, 293, 294. 342

D.

Dacosta v. Atkins, 350
v. Pym, 99, 101
v. Villa Real, 75
Dale v. Sollet, 271
Daniel v. Hill, 23
v. North, 318
v. Pitt, 11
v. Wilson, 431
Danstey v. Westhouse, 162
Dartmouth (Lady) v. Roberts, 26. 53. 443
Darwin v. Upton, 315
Davies v. Dinwoody, 173
Davies v. Pearce, 14
v. Williams, 218. 368
Davy v. Smith, 390
Dawe v. Holdsworth, 271
Deacon v. Cooke, 158
Deal v. Harding, 162
Dean and Chapter of Ely v. Warren, 204
De Gaillon v. L'Aigle, 280
De Mitton v. De Mello, 26
Den dem. Alston v. Waine, 342
Goodwin v. Spray, 85
Tarzwell v. Barnard, 28
Taylor v. Lord Abingdon, 348
Derby (Earl of) v. Taylor, 284
Deway v. Baynton, 416
Willan v. Walker, 342
Denham v. Stephenson, 406
Derisly v. Nevil, 325
Dibdin v. Swan, 307
Dickenson and Wife v. Davis, 352
Dickenson v. Coward, 358
Shee, 276
Dickson v. Fisher, 31
Digby v. Stedman, 18
D'Israeli v. Jarvis, 78
Dixon v. Cooper, 100
Dodd v. Kyffin, 325
Dodd's (Dr.) Case, 136. 165
Doe v. Calvert, 342
v. Jesson, 379
v. Parker, 283
Doe dem. Banning v. Griffith, 379
Banning v. Griffiths, 379
Beach v. Lord Jersey, 118
Bingham v. Cartwright, 340
Birch v. Phillips, 345
Bowerman v. Sybourne, 53, 337
Bradford (Lord) v. Watkins, 342
Brand v. Brown, 116
v. Greening, 115
Brownfield v. Smith, 258
Bristowe v. Pegge, 385
Burdett v. Wright, 387
Chamberlayne v. Lloyd, 5
Chevalier v. Hulthwaite, 113
Chichester v. Oxendon, 118
Clarke v. Grant, 340
Clun (Bailiff, &c. of) v. Clarke, 339
Cooke v. Danvers, 112. 330. 457
Cookson v. Thorpe, 78
Coore v. Clare, 258
Da Costa v. Atkins, 350
v. Walton, 348, 349. 407
Copley (Bart.) v. Day, 248
Didsbury v. Thomas, 17
Dowding v. Bissell, 258
Duckett v. Watts, 329
Durour v. Jones, 332
Esdale v. Mitchell, 360
Fisher v. Prosser, 331
Forster v. Williams, 152
Foster v. Sisson, 461
v. Wandlass, 346
Freeland v. Burt, 114
George v. Jesson, 332
Gigner v. Roe, 334
Goodwin v. Spray, 461
Graham v. Scott, 336. 439
Heapy v. Howard, 341
Hillings v. Bird, 332
Hodson v. Staple, 366
Howell v. Lloyd, 107. 336
Jackson v. Ramsbottom, 339

Doe dem. Johnson v. Earl Pembroke, 14
Jones v. Wylde, 152
Jupp v. Andrews, 174
Knight v. Smith, 339
Lancashire v. Lancashire, 120. 402
Leicester v. Biggs, 340
Mason v. Mason, 85
Matthewson v. Wrightman, 342
Marris v. Rosser, 73
Mawson v. Liston, 358, 359
Parkes v. Parkes, 401
Palmer v. Tomkins, 457
Passingham v. Lloyd, 85
Powell v. Harcourt, 82
Puddicomb v. Harris, 340
Putland v. Hilder, 337
Rees v. Robson, 19
Scholefield v. Alexander, 346
Small v. Allen, 126
Smelt v. Fuchan, 345
Smith v. Smith, 458
Stephenson v. Walker, 6
Strickland v. Spence, 340
Sykes, bart. v. Durnford, 95. 343
Tarrant v. Hellier, 456. 460
Tofield v. Tofield, 457
Tyrrell v. Lyford, 116
Vernon v. Vernon, 457
Webber v. Ld. G. Thynne, 16
White v. Cuff, 334
Williams v. Humphreys, 344
v. Pasquali, 343
Wood v. Morris, 257
Woodmas v. Mason, 71
Woomball v. Baker, 240
Douglas v. Yallop, 33
Downes v. Moreman, 88
Drake v. Smith, 444
v. Sykes, 412
Draper v. Glossop, 288
Drewry v. Twiss, 206
Drummond's Case, 19
v. Dorant, 317
Du Barre v. Livette, 173
Duffield v. Orrell,
Duffin v. Smith, 174
Duncan v. Scott, 36
Dunn v. Peel, 355
v. White, 350
Dunlop v. Waugh, 242
Durston v. Tuthan, 203
Dutton v. Colt, 239
v. Solomonson, 246

E.

Earl v. Lewis, 87
Earl dem. Goodwin v. Baxter, 28.
Easton v. Jacques, 285
East India Company v. Gosling, 162
Eccleston v. Petty alias Speke, 53, 390
Edmonson v. Machal, 355
v. Stephenson, 307
Edwards v. Cooke, 353
v. Evans, 168
v. Dick, 233
v. Harbin, 369, 415
v. Vesey, 90
Egerton v. Matthews, 230
Egg v. Barnet, 268
Eggleston v. Speke, 399
Elden v. Keddel, 369
Eldridge v. Knott, 26
Elliott v. Duke of Norfolk, 424
v. Edwards, 238
v. Rogers, 254
Ellis v. Smith, 383. 400
Elmore v. Stone, 227
Elsam v. Faucet, 6
Ely (Dean and Chapter of) v. Warren, 204
Emerson v. Blendon, 22
v. Heelis, 218. 224. 228
England dem. Syburne v. Slade, 259, 336, 338
Etherington v. Parrot, 248
Ethersey v. Jackson, 287
Evans v. Branden, 425
v. Man, 360
v. Williams, 161
Evelyn (Sir Fred.) v. Haynes, 37, 39
Ewing v. Peters, 375
Exall v. Partridge, 250

F.

Fabian v. Winston, 346
Fachina v. Sabine, 138

Fairclaim d. Empton v. Shackleton, 331
Fairlie v. Hastings, 23
Farebrother v. Ansley, 252
Farnsworth v. Garrand, 265
Farr v. Price, 231
Fasset v. Brown, 96
Favence v. Bennet, 266
Fawcet v. Beavres, 356
Fell v. Wilson, 442
Feltham v. Terry, 431
Fen d. Blanchard v. Wood, 359
Fenney dem. Eastham v. Child, 258
Fenwick's (Sir John) Case, 59
Ferrars v. Arden, 39
Ferrar's Case, 39
Field v. Curtis, 163
Fielder v. Starkin, 242
Filmer v. Gott, 126
Finch v. Lamb, 274
Finchet v. How, 261
Finnerty v. Tipper, 306
Fisher v. Lane, 72
v. Samuda, 265
Fitch v. Sutton, 265
Fitchet v. Adams, 328
Fitzgerald v. Eustace, 107
v. Elsee, 96
Fletcher v. Wilkins, 431
Flower v. Adam, 314
v. Herbert, 164
Fonsick v. Agar, 60
Focus v. Salisbury, 329
Folkes v. Chad, 196
Forbes v. Lord Middleton, 274
v. Wale, 106
Ford v. Fothergill, 279
v. Grey, 107. 329. 333
v. Maxwell, 262
Fores v. Wilson, 355
Fosset v. Franklin, 447
Foster v. Allison, 253
v. Bonner, 31
Fotheringham v. Greenwood, 152
Fowler v. Down, 321
Fox v. Lushington, 162
Francisco v. Gilmore, 60
Frazer v. Hopkins, 78
Freeman v. Phillips, 14. 63
French v. Backhouse, 167
v. Patten, 219
v. Fulston, 167
Frith v. Gray, 206
Fuller v. Jackson, 162
v. Prest, 419
Fullon v. Fotch, 48
Furber v. Andrews, 260
Furley v. Newnham, 198
Furneaux v. Hutchins, 204

G.

Gahagan's Case, 11
Gale v. Walsh, 234
Ganer v. Lady Lanesbro', 363
Gape v. Handley, 123
Garrels v. Kensington, 69
Garret v. Lister, 368
Garron v. Galbraith, 336
Gawer v. James, 274
Gea v. Lethbridge, 425
Gerard v. Roebeck, 207
Gibbon v. Coggan, 419
Gibson v. Hunter, 3
v. M'Carty, 43
v. Spurrier, 237
Giles v. Hart, 276
Girlington v. Pitfield, 309
Glazebrook v. Woodrow, 237, 240
Glascot v. Day, 276
Glossop v. Pole, 83
Goddard v. Cox, 288
Godfrey v. Norris, 98
Godin v. Ferris, 433
Goodacre v. Breame, 159. 167
Goodier v. Lake, 94
Goodison v. Nunn, 237
Goodland v. Blewitt, 275
Goodright d. Carter v. Cordwent, 343
Faro v. Hicks, 6
Glazin v. Glazin, 495
Hare v. Cator, 328
Stevens v. Moss, 178
Thompson v. Saul, 380
Walter v. Davids, 347
Goodtitle d. Alexander v. Clayton, 392
Eastwicke v. Way, 220. 358
Forbes v. Welford, 151. 153
Holford v. Otway, 120. 496
King v. Woodward, 294. 342, 343
Luxmoore v. Saville, 194

Goodtitle d. Jones v. Jones, 337
Radford v. Southern, 118
Revet v. Braham, 5. 102
Woodhouse v. Meredith, 404
Gordon v. Harper, 320
v. Secretan, 105
Gorton v. Dyson, 369
Goss v. Tracy, 98, 151
Govett v. Radnidge, 213
Gough v. Howard, 260
Gould v. Johnson, 290
v. Jones, 99
Graft v. Lord Brownlow Bertie, 100
Graham v. Hund. of Beacontree, 298
Granger v. Furlong, 163
Grant v. Jackson, 54
Gray v. Cookson, 434, 435
Grayson v. Atkinson, 384
Green's Case, 298
Green v. Brown, 235
v. Hewitt, 83
v. Jones, 163
v. New River Company, 161
v. Parker, 278
v. Rennet, 203
Grellier v. Neale, 96
Griffin v. Blandford, 203
Griffith v. Squire 262
Griffiths v. Young, 226
Grillard v. Hogue, 60
Grimaldi v. White, 246. 264
Grimwood v. Barrett, 203
Groinvolt v. Burrel, 89
Groome v. Forrester, 435
Groves v. Buck, 226
Gryle v. Gryle, 383. 385
Guest v. Lloyd, 304
Gully's Case, 131
Gunnis v. Erhart, 111
Gunstone v. Downes, 141
Gutteridge v. Smith, 210
Gwilliam v. Barker, 426
Gyfford v. Woodgate, 50

H.

Habershon v. Troby, 311
Hale v. Small, 357
Halier v. Hund. of Benhurst, 298
Halifax's (Lord) Case,
Hall v. Cazenove, 111
v. Hill, 21
v. Vaughan, 257
Hallet v. Mears, 198
Hallewell v. Trappes, 443
Hammersley v. Knowlys, 269
Hammond v. Stewart. 197
Hands v. James, 392
v. Slaney, 278
Hanson v. Parker, 20
Stephenson, 285
Tomlin, 256
Hardidge v. Gibbs, 442
Hardwell v. Jarman, 130
Hardy v. Bern, 287
v. Cathcart, 450
Hare v. Cator, 284
Harris v. Huntbach, 252
v. James, 361
v. Morris, 249
v. Tippett, 135
v. Woolford, 291
Harrison's Case, 61
Harrison v. Harrison, 384
Hart v. M'Namara, 48
Harvey's Case, 74
Harwood v. Sim, 15
Hasselden v. Bradney, 27
Hasting's Case, 130
Hatch v. Blissett, 199
Hatherway v. Brown, 46
Havelock v. Rockwood, 70
Hawke v. Bacon, 317
Hawkins v. Perkins, 180
v. Plomer, 422
v. Rutt, 267
Haycraft v. Creasy, 311
Hayling v. Hastings, 272
Haynes v. Wood, 246
Headsley v. Russel, 370
Heath v. Hall, 163
Heckscher v. Gregory, 244
Hedger v. Roe, 408
Heller v. Toke, 430
Henchett v. Kimpson, 426
Hendy v. Stephenson, 325
Henkel v. Bromley, 219
Hennel v. Lyon, 57
Henry v. Adey, 70
Hensey's Case, 99
Henshaw v. Pleasance, 48. 434
Herbert's Case, 406
Herbert v. Ashburner, 89

Herbert v. Cooke, 73
Hereford (Bishop of) v. Duke of Bridgewater, 91
Herver v. Dowson, 307
Hervey's Case, 74
Hickey v. Hayter, 372
Higham v. Ridgway, 18
Hill v. Bateman, 435
v. Fleming, 149
v. Humphreys, 261
v. Leigh, 412
v. Sheriff of Middlesex, 412
v. Wathen, 323
Hillyard v. Grantham, 44
Hindal v. Blades, 425
Hinde v. Whitehouse, 227
Hitchin v. Campbell, 37, 38
Hoare v. Croyton, 357
Hobson v. Parker, 90, 91
v. Todd, 319
Hodges v. Wyndham, 353
Hodgkinson v. Marsden, 287
Hoil v. Clerk, 400
Holbird v. Anderson, 417
Holcroft v. Heel, 317
Holdfast dem. Anstey v. Downing, 154
Woollam v. Clapham, 457
Holford v. Hatch, 284
Holland v. Hopkins, 223
v. Palmer, 351
Holmes v. Pontin, 97. 259
Holt v. Brian, 248
Holyland (ex parte), 396
Home v. Lord F. Bentinck, 90
Hopewell v. De Pinna, 280
Hopkins v. Neal, 151. 167
Hoskins v. Knight, 426
How v. Hall, 105
Howard (Lord) v. Bell, 145
Howard v. Burtonwood, 85. 208
v. Castle, 238
v. Shipley, 168
Howe v. Palmer, 228
Howell v. De Pinna, 300
Hudson v. Kersey, 391
Hughes v. Morley, 361. 363
v. Dolben, 411
Hume v. Peploe, 276, 277
Hunt v. Andrews, 78. 291
v. Bridgewater, 207
v. Stevens, 368
v. Silk, 239
Hunter v. Britt, 350
Hunter v. King, 144. 165
Hutchinson's Case, 69
Hutchins v. Piper, 291
Huxham v. Smith, 276
Hyde v. Hyde, 400
v. Cogan, 301

I.

Jackson v. Fairbank, 273
v. Hurlock, 402
Jacob v. Lindsay, 195
Janson v. Wilson. 64
Jaques v. Whitcomb, 418
Jarret v. Leonard, 357
Jayne v. Price, 377
Jee v. Hockley, 444
Jeffery v. Barrow, 409
Jekyll v. Sir T. Moore, 307
Jelps v. Ballard, 365
Jenkins v. Pritchard, 329
v. Reynolds, 230
v. Turner, 312
Jennings v. Hankey, 148
Jervis v. Hayes, 161
Jewdwine v. Slade, 242
Iggulden v. May, 124
Ilderton v. Atkinson, 161
Illingworth v. Leigh, 15, 87
Incledon v. Berry, 310
John v. Fothergill, 159
Johnson v. Browning, 147
v. M'Adam, 355
v. Mapletoft, 277
v. Mason, 95
v. Smith, 31
Jones v. Berkley, 237
v. Bow, 75
v. Brook, 151. 161
v. Brown, 355
v. Cooper, 222
v. Hund. of Bromley, 298
v. Lake, 384
v. Le Davids, 447
v. Mason, 97
v. Newman, 112
v. Perry, 313
v. Pope, 288
v. Randall, 34. 36. 52
v. Vaughan, 428
v. White, 83
dem. Griffiths v. Marsh, 342
Jordaine v. Lashbrook, 176
Jory v. Orchard, 104

Ireland v. Powell, 13; 16
Irvin v. Dearman, 338
Irwing v. Wilson, 431

K.

Kabi v. Jansem, 22
Kannen v. M'Mullen, 263, 264
Keech d. Warne v. Hall, 348
Keeling v. Ball, 96
Kempland v. M'Cauley, 420
Kempton v. Cross, 67. 71
Kenebel v. Scrafton, 402
Kennet v. Greetwollers, 164
Kenn's Case, 75
Kensington v. Chandler, 207
Kent v. Huskinson, 229
Kershaw v. Cox, 219
Kidd v. Rawlinson, 415
Killington (Vicar of) v. Tr. Coll. 83
Killow v. Roden, 407
Kinaston v. Clarke, 407
King v. Meredith, 247
The King v. Abergwilly, 62
v. Abingdon (Lord), 308
v. Aickles, 78
v. Almon, 304, 307
v. Azire, 170
v. Babb, 92
v. Bell, 140
v. Bellringer, 123
v. Berry, 304
v. Blackmore, 148
v. Bolton with Harrowgate, 36
v. Bolton, 46. 144. 264
v. Bray, 143
v. Bramley, 177
v. Broughton, 143
v. Brown, 92
v. Burbage, 198
v. Burdett (Sir F.), 306
v. Carpenter, 156
v. Carr, 54
v. Castle Bainbridge, 140
v. Castle Carelaton, 138
v. Castlemain (Lord), 132
v. Castle Morton, 94
v. Castleton, 95
v. Cater, 102
v. Clarke, 292
v. Cliveger, 172
The King v. Cole, 148
v. Corbelius, 91
v. Cotton, 14
v. Creevey, 306
v. Crosby, 131
v. Dalby, 144
v. Dalton, 105
v. De Camx, 426
v. Dingler, 61
v. Edwards, 133
v. Ellis, 142, 143
v. Eriswell, 15. 61
v. Erith, 14. 16
v. Ferry Frystone, 62
v. Fletcher, 148
v. Ford, 131
v. Fox, 153
v. Frederick and Tracy, 169
v. Gardner, 140
v. Gibson, 76
v. Gilham, 169
v. Gisburn, 183
v. Gordon (Lord Ged.) 52
v. Grimes, 76
v. Grundon, 75
v. Gwin, 88
v. Hammersmith, 15
v. Hardwick, 20
v. Hart, 306
v. Head, 84
v. Hemming and Windham, 61
v. Heydon, 91
v. Hollister, 90
v. Holt, 77
v. Hopper, 350
v. Hostmen (Fraternity of), 90
v. Johnson, 94. 148
v. Kea, 178
v. Killerby, 158
v. Kirdford, 158
v. Laindon, 128
v. Lambert, 307
v. Lee, 92
v. Little Lumley, 158
v. London (Mayor, &c. of), 156
v. Lucas, 91
v. Luffe, 381
v. Maidstone, 391
v. Mary Magdelen, 146
v. St. Mary Nottingham, 178

The King v. Merton, 94
v. Middleton, 105
v. Moise, 143
v. Morris, 57
v. Mothersell, 88
v. Neatherseal, 67
v. Newland, 165
v. Nuneham Courtney, 62
v. Nunez, 143
v. Oulthampton (Mayor and Burgesses of), 159
v. Osborne, 128
v. Paine, 61
v. Pancras, 42
v Parr, 164
v. Pearce, 304
v. Peltier, 307
v. Pendleton, 215
v. St. Peter, 177
v. Phillips and Archer, 159
v. Priddle, 131
v. Prosser, 158
v. Pureſoy, 61
v. Purnal, 91
v. Radbourne, 60
v. Ravenstone, 61
v. Reading, 178
v. Reeves, 53
v. Rhodes, 164, 165
v. Robins, 159
v. Rodham, 198
v. Russel, 164
v. Ryton, 106
v. Scammonden, 121
v. Sponsonby, 165
v. Stockdale, 53
v. Stockland, 177
v. Stone, 290
v. Sutton, 78
v. Taylor, 129. 138. 164
v. Teal, 132. 136
v. Teasdale, 148
v. Thornton, 165
v. Tilly, 148
v. Topham, 304
v. Travers, 128
v. Turner, 140
v. Twining, 6. 379
v. Usher, 165
v. Varlo, 123.
v. Vincent, 76
v. Warden of the Fleet, 168
v. Warminster, 61
v. Warwickshall, 24
The King v. Westbeer, 60
v. White, 138
v. Whiting, 45. 142, 148
v. Whitley (Lower), 20
v. Wilts, 149
v. Withers, 77
v. Woburn, 181
v. Wright, 307
v. Wych, 140
Kingston's (Duchess of) Case, 175
Kingston v. Gray, 372
v. Phelps, 73
upon Hull (Mayor of)
v. Horner 96
Kinnersley v. Orpe, 41
Kinsman v. Crooke, 58
Kirk v. French, 309, 310
Kirtland v. Pourzett, 267
Knibbs v. Hall, 38
Knight v. Danler, 33
Knill v. Williams, 220
Knobel v. Fuller, 308
Knowles v Michel, 253
Koopes v. Chapman, 183
Kynaston v. Clarke, 442

L.

Lade v. Holdford
Laing v. Raine, 95
Lake v. Hund. of Croydon, 208
v. Lake, 119
Lambert v. Pack, 234
Lancashire v. Lancashire, 408
Lane v. Anderson, 78
v. Degberg, 49
Langdon v. Hull, 104. 284
Langhorne v. Alnutt, 22
Langston v. Cotton, 198
Lara v. Bird, 278
Larkin v. Larkin, 401
Laroche v. Wakeman, 321
Latkow v. Eamer, 83
Laughton v. Ward, 318
Law v. Wills, 257
Lawrence v. Worral, 291
Lawson v. Capelland, 871
Lea v. Libb, 387
Leader v. Barry, 280
Leaper v. Tatton, 278
Lechmere v. Toplady, 39
Lee v. Gansel, 132
v. Husqs, 394

Lee v. Lopes, 426
v. Muggeridge, 280
v. Rogers, 288
Leech v. Bailey, 443
Leeds v. Cooke, 95
Leggatt v. Tollervy, 309
Legh v. Hewit, 260
Leglisle v. Champante, 212
Legrosse v. Levemore, 15
Leicester (Lord) v. Walter, 318
Leighton v. Leighton, 31
Lemayne v. Stanley, 383. 386
Lemore v. Dears, 96
Leonard v. Baker, 416
Lewis v. Clarges, 39
v. Cosgrave, 265
v. Fog, 162
v. Piercy, 363
v. Price, 315
Lightfoot v. Cameron, 199
Lindsey v. Lindsey, 338
Lion v. Lamb, 230
Lloyd v. Harris, 310
v. Lee, 280
v. Maund, 273
v. Williams, 149
Lockyer v. Jones, 276
Lomas v. Novosilienski, 266
Lomax v. Holmden, 381
London (city of) v. Clarke, 44
Longford v. Eyre, 391
Lord v. Tuck, 446
Lovat's (Lord) Case, 182
Lovelace v. Curry, 432
Lowden v. Goodrich, 324
Lowe v. Jolliffe, 96. 151. 176. 392
Lowther v. Radnor (Earl of), 434
Lugg v. Lugg, 402
Lundie v. Robertson, 234
Luttrel v. Cary, 58

M.

Maberley v. Robins, 238
M'Arthur v. Lord Seaforth, 245
M'Clure v. M'Keand, 207
M'Dougall v. Claridge, 308
Macferson v. Thoytes, 100
Machel v. Temple, 390
Mackenzie v. Banks, 218
Maclellan v. Howard, 275
M'Manus v. Cricket, 315
M'Neil v. Perchard, 412
Maddox v. Miller, 278
Maloney v. Bartley, 179
Maltby v. Christie, 246
Manby v. Curtis, 101
v. Scott, 247
Manchester Mills (Case of), 66
Mansfield (Lord) v. Clarke, 443
Manwaring v. Sands, 249
Marriage v. Laurence, 88
Marriott v. Hampton, 37
Marsden v. Gray, 210
Marshal v. Rutton, 280
Marsh v. Colnet, 244
Martin v. Bell, 412
v. Drayton, 144
v. Goble, 316
v. Horrel, 160
v. Podger, 413
v. Savage, 404
v. Slade, 418
v. Winder, 262
Mason v. Pritchard, 223
Massey v. Johnson, 430. 433. 435.
Mathews v. Lee, 409
Matson v. Wharam, 222
Matthews v. Phillips, 274
Maud v. Howell, 417
Maugham v. Walker, 291
Max v. Roberts, 213
Maxwell v. Jameson, 251
May v. Gwynne, 92
v. May, 84
Mayhew v. Locke, 433
Mayne v. Walter, 70
Mayor of Southampton v. Graves, 90
Mead v. Daubingny, 304
v. Norbury, 443
v. Robinson, 168
Mearsfield v. Marsh, 367
Meath (Bishop of) v. Lord Belfield, 121
Mechell v. Roberts, 86
Mee v. Reed, 139
Meers v. Lord Stourton, 12
Meggot v. Mills, 289
Mellish v. Allnutt, 211
v. Motteux, 242
Melville v. Haydon, 223
Melville's (Lord) Case, 180.

Mercier v. Wise, 360
Meredith v. Gilpin, 158
Meret v. Harvey, 324
Merle v. Wells, 223
Merryweather v. Nixon, 252
Mersey and Irwell Nav. Comp. v. Douglas, 205
Michael v. Stockwith, 282
Michel v. Alestree, 314
Middleton v. Brewer, 211
Mildmay v. Mildmay, 67
Mildrone's Case, 139
Miles v. Dawson, 196
v. Rose, 37. 39
Miller v. Forster, 87
v. Hennick, 72
v. Towers, 262
Mills v. Auriol, 255
v. Bennett, 359
Millwood v. Walter, 208
Milton v. Green, 431
Minet (ex parte), 230
Mitchell v. Walker, 443
Moises v. Thornton, 71. 303
Mon v. Adam, 197
Money v. Leach, 431
Monks v. Butler, 442
Monroe v. Twisleton, 171
Montgomerie v. Clarke, 50
Moody v. Thurston, 90
Moore v. Blake, 350
v. Foley, 124
v. Hart, 228
v. Hill, 253
v. Pyrke, 250
Moravia v. Levy, 253
Moreland v. Bennet, 288
Morewood v. Wood, 101
Morgan v. Ambrose, 255. 259
v. Bridges, 412
Morgan's Case, 138
Morris v. Miller, 83. 352
v. Norfolk, 21
v. Pugh, 31
Morrison v. Kelly, 309
Morton v. Lamb, 239
Moses v. Macfarlan, 38
v. Norris, 420
Mostam v. Ivy, 81
Mowbray v. Fleming, 262
Mulgrave v. Ogden, 321
Mytton v. Harris, 444

N.

Naish v. Tatlock, 255
Nash v. Edmunds, 458, 459
v. Molins, 445
Neale v. Fry or Jay, 88
Nesham v. Armstrong, 301
New v. Chidgey, 168
Newby v. Read, 235
Nix v. Cutting, 169
Noel v. Wills, 68
Norcot v. Croot, 163
Norden v. Twibill, 145
North v. Milles, 22
Northwick (Lord) v. Stanway, 461
Norwood v. Stevenson, 351

O.

Oates dem. Wigfall v. Brydon, 328. 334.
Oddy v. Bovil, 71
Olive v. Gwin, 34
Oliver v. Lawrence, 140
Omichund v. Barker, 137, 138
O'Neil v. Marson, 424
Onyons v. Tyrer, 399
Orford (Mayor of) v. Richardson, 319
Orrel v. Maddox, 330
Osborne v. Gough, 433
v. Harper, 252
Outram v. Morewood, 15. 39. 41
Owen v. Wooley, 273
Owenson v. Morse, 267
Oxenden v. Penrice, 155
Oxlade v. Perchard, 164

P.

Padget v. Priest, 369
Page's Case, 32
Page v. Eamer, 425
Panton v. Jones, 255
Pariente v. Plumptree, 420
Paris's Case, 143
Park v. Mears, 96
Parker v. Atfield, 374
v. Hoskins, 98

Parker v. Staniland, 224
Parsons v. Crosby, 167
v. King, 291
Parton v. Williams, 432
Pasley v. Freeman, 311
Passwell v. Godsall, 105
Patrick v. Greenway, 319
Payler v. Homersham, 110
Payne v. Shadbolt, 241
v. Whale, 243
Peaceable dem. Hornblower v. Read, 329. 331
Peacock's Case, 58
Peacock v. Rhodes, 232
Pearce v. Hooper, 108
Pearson v. Fletcher, 365
v. Henry, 370
v. Isles, 197
Peaselie's Case, 368
Peate v. Ongley, 385
Pederson v. Stoffles, 152
Peeram v. Palmer, 240
Pendock d. Mackinder v. Mackinder, 130, 131. 391
Pendrel v. Pendrel, 380. 382
Penphrase v. Lord Lansdown, 387
Peshall v. Layton and Marshal, 418
Peterboro' Bridge (Case of), 149
Petit v. Addington, 324
Petrie v. Hannay, 252
Phillips v. Astlino, 223
v. Bacon, 201
v. Bury, 75
v. Sculthorpe, 259
Philp v. Squire, 21. 364
Philpot v. Wallet, 244
Phipps v. Packer, 96
Pickering v. Dawson, 242
Pickersgill v. Palmer, 433
Pickstock v. Lyster, 417
Piercy v. Sir T. Jones, 64
Pigot's Case, 282
Pike v. Crouch, 40
Pinder v. Wadsworth, 319
Pine v. Dor, 390
Pirie v. Anderson, 235
Pitman v. Maddox, 18
Pitton v. Walter, 49
Plant v. Anderson, 420
Pleasant dem. Hayton v. Benson, 342
Plunkett v. Penson, 407, 411
Podger's Case, 389
Pollard v. Bell, 70
v. Scott, 87
Pope v. Forster, 402
Porter v. Hand. of Ragland, 186
Porthouse v. Parker, 234
Postlewaite v. Gibson, 432
Potherick v. Turner, 28
Pothonier v. Dawson, 321
Potter v. Rawerth, 234
Potts v. Durant, 86
Powell v. Edmunds, 111
v. Herd, 161
v. Layton, 213
v. Little, 267
v. Milbank, 26. 440
Powley v. Walker, 260
Poynton v. Forster, 311
Preston v. Merceau, 122
Price v. Hund. of Chewton, 296
v. Littlewood, 15
v. Messenger, 431
v. Woodburne, 208
Pricket (ex parte), 261
Prince v. Blackburn, 97, 98
Pritt v. Fairclough, 18
Prudhem v. Phillips, 76
Puckle v. Moore, 271
Purcell v. Macnamara, 309. 388
Putton v. Purbeck, 348

Q.

Quantock v. England, 289
Queen (The) v. Muscot, 9
Queen's Case, 7. 139. 185. 6, 7, 8, 9, 190, 1, 2, 3, 4

R.

Radford v. Briggs, 25
v. M'Intosh, 25
Ramsbottom v. Buckland, 348
v. Morley, 220
v. Tunbridge, 220
Randall v. Blackburne, 99
Rands v. Thomas, 186
Rankin v. Horner, 359
Ratcliffe & Chaplin's Case, 407
Ravee v. Farmer, 111

Raven v. Dunsley, 149
Raynes v. Twigood, 180
v. Spicer, 180
Rawson v. Johnson, 239, 240
Rea v. Elkins, 50
Read v. Allen, 459
v. Brookman, 94
v. Nash, 204
v. Sowerby, 305
Read's (Sir Thos.) Case, 88
Reading v. Rawstorne, 331. 408
Reddie v. Scholt, 355
Redpath v. Roberts, 259
Redshaw v. Hesser, 409
Reed v. Brookman, 325
v. Golding, 276
v. Jackson, 42
v. Passer, 85
Regina v. Mead, 91
Reid v. Clarke, 500
Reyner v. Pearson, 22
Rhoydes v. Ainsworth, 160
Ribbans v. Crickett, 211
Rice v. Shute, 212
Rich v. Topping, 177
Richards v. Acton, 425
Richardson v. Atkinson, 72. 321
v. Williams, 42
Rickson v. Sandford, 162
Ridley v. Taylor, 150
Right d. Cator v. Price, 383, 390
d. Fisher v. Cuthell, 334. 342
d. Flower v. Darby, 340
Rippener v. Wright, 94. 215
Roberts v. Fortune, 42
v. Mahston, 6
Robertson v. Brench, 235
Robinson v. Davies, 94
v. Drybrough, 228
Robson v. Calze, 361
v. Eaton, 287
v. Hall, 228
v. Fowney, 219
Roch v. Rix, 64. 66
Roe d. Beebee v. Parker, 85
d. Bennett v. Jeffery, 461
d. Brewre v. Wilkinson, 340
d. Brune v. Rawlins, 201
d. Clarges v. Potter, 340
d. Connelly v. Vernon, 118
d. Cosh v. Lowless, 156
d. Gilman v. Heyhoe, 362
Roe d. Gregson v. Harrison, 347
d. Henderson v. Charnock, 340
d. Jackson v. Ashburner, 258
d. Jeffereys v. Hicks, 456
d. Johnson v. Ireland, 97
d. Langdon v. Rowlston, 333
d. Pellatt v. Terrars, 55
d. Reade v. Reade, 358
d. Thorne v. Lord, 379
d. West v. Davies, 93
v. Haslund, 379
v. Popham, 119
v. Wiggs, 342
Rogers v. Allen, 140
v. Clifton, 306
v. Pitcher, 339
Rolfe v. Dort, 32
Rolles v. Rosewell, 287
Rondeau v. Wyatt, 295, 296
Ross v. Johnson, 322
Rotheram v. Fanshaw, 443
Rotheroe v. Elton, 169
Routledge v. Thornton, 63
Roweroft v. Basset, 161
Rowe v. Young, 232
Rucker v. Hannay, 273
Rudd's Case, 136. 142
Rumney v. Eves, 456
Rushworth v. Countess of Pembroke, 40. 62
Russel v. Bolrene, 535
v. Russel, 164
Rustil v. Maquister, 304
Ruston's Case, 128

S.

Sackvill v. Brown, 458
Sadler's Company v. Jones, 229
Saint Catherine's Hospital (Case of), 86
Saint John's College v. Murcux, 426
Salisbury's (Lord) Case, 480
Salop (County of) v. County of Stafford, 257
Saloman v. Gordon, 434
Salvucci v. Johnson, 69
v. Woodmas, 69

Salte v. Thomas, 78
Sanderson v. Baker, 413
v. Jackson, 229
v. Judge, 234
v. Nichol, 372
Sandy v. Custom House Officers, 145
Santler v. Heard, 206. 208
Sarel v. Wine, 368
Saunders v. Darling, 425
Savage v. Smith, 418
Saville v. Roberts, 309
Sawyer v. Mercer, 371
Schneider v. Heath, 242.
v. Norris, 229
Scholey v. Walsby, 235
Scott v. Lord Oxford, 304
v. Nelson, 278
v. Shearman, 37. 48. 434
Searle v. Keeves, 227
v. Lord Barrington, 29
Seddon v. Tutop, 38
Selby v. Harris, 35
Selwin v. Baldy, 442
Sendill's Case, 295
Seward v. Willock, 239
Seymour's (Sir Edw.) Case, 401
Shaftesbury (Lord) v. Lord Digby, 12
Shaw v. Markham, 104. 234
Sheers v. Glasscock, 390
Shelley's Case, 370
Shepherd v. Johnson, 245
v. Shepherd, 402
Sherwin v. Clarges, 39
Short d. Gastrell v. Smith, 400
Shrewsbury v. Hund. of Aston, 295
Shute v. Higden, 438
Shuttleworth v. Bravo, 163
Simmonds v. Parminter, 234
Simon v. Motivos, 223. 225. 227, 228
Skelton v. Hawling, 375
Skinner v. Upshaw, 321
Slack v. Buchannon, 24
Sloman v. Horne, 418
Smallcomb v. Buckingham, 415. 420
Smartle v. Williams, 19
Smith v. Allison, 353
v. Angel, 406, 407
v. Bower, 274
v. Chester, 233
Smith v. Codron, 384
v. Davies, 91. 370
v. Evans, 383
v. Gordon, 57
v. Johnson, 111
v. Lyon, 20
v. Parkhurst, 329
v. Pelah, 313
v. Plomer, 320
v. Prager, 144
v. Rummins, 46
v. Russel, 426
v. Taylor, 303
v. Thatcher, 233
v. Veale, 66
v. Woodward, 282
Smithson's (Sir Hugh) Case, 37
Snow d. Crawley v. Phillips, 440
Snow v. Phillips, 53
Snowdon v. Smith, 309
Somerset (Duke of) v. France, 205
Sorbin v. De Burgh, 432
Southampton (Mayor of) v. Graves, 90
Soulsby v. Neving, 293
Sparin v. Drax, 57
Sparke's Case, 175
Spence v. Stuart, 198
Spencely v. De Willot, 134
v. Schulenberg, 175
Spencer v. Goulding, 147
Spicy v. Bowens, 161
Spong v. Fasting, 162
Spurrier v. Elderton, 251
Spybey v. Hide, 276
Stadt v. Lill, 230
Stainer v. Droitwich, 79
Standen v. Standen, 177
Stanley v. White, 204
Stansfield v. Johnson, 228
Stanway v. Perry, 291
Staples v. Okines, 150
Stead v. Heaton, 15
Steele v. Rooke, 373. 410
Steers v. Lashley, 252
Stevens v. Moss, 14
v. Walker, 145
Stephenson v. Nevinson, 158
Stevenson v. Jones, 179
Stokes v. Berry, 330
v. Lewis, 250
Stone v. Evans, 285
Stonehouse v. Evelyn, 385

Story v. Atkins, 252
Street v. Marquis of Blandford, 353
Strickland v. Spence, 341
v. Ward, 75. 432. 434, 435
Stuart v. Rowland, 253
Stubbing v. Heintz, 248
Sumner v. Brady, 351
Swinnerton v. Goddard, 71
v. Marq. of Stafford, 86
Swire v. Bell, 96
Sykes v. Dunbar, 309
Symonds v. Knight, 359

T.

Tabert v. Tipper, 347
Talbot v. Hodson, 94
Talbot v. Villeboys, 91
Tanner v. Taylor, 195
Tapp v. Lee, 311
Tashmaker v. Hund. of Edmonton, 295
Taylor's Case, 165
Taylor v. Cole, 14. 53
v. Fenwick, 433
v. Hague, 231
v. Higgins, 251
d. Atkins v. Horde, 304
Tealby v. Gascoigne, 412
Tempest v. Linley, 419
v. Rawling, 258. 260
Templer v. M'Lachlan, 265
Terry v. Huntingdon, 48
Thanet (Lord) v. Patterson, 67
Thatcher and Waller's Case, 61
Thomas v. Thomas, 112
Thompson v. Bird, 162
v. Harvey, 249
v. Jones, 105
v. Miles, 237, 238
Thornton v. Royal Exch. Assur. 196
Throgmorton v. Walton, 378
Thrupp v. Fielder, 278
Thurtel v. Hund. of Mulford, 301
Thynne v. Protheroe, 367
Tilly's Case, 58
Tinckler v. Walpole, 78
Title v. Grevett, 179
Titner v. Titner, 401
Todd v. Stokes, 249
Tooker v. Duke of Beaufort,
Tooms v. Painter, 287
Torrington's (Lord) Case, 18
Tower v. Cameron, 361
Towers v. Barrett, 243
v. Osborne, 226
Townend v. Dawson, 168
Treacher v. Hinton, 233
Trelawney v. Coleman, 353
v. Thomas, 166
Trethewy v. Ackland, 374
Trimmer v. Jackson, 384
Trowell v. Castle, 67
Truman v. Hurst, 279
v. Fenton, 272
Tummins v. Rowlison, 293
Turner v. Crisp, 29
v. Eyles, 422
v. Pearte, 182
v. Richardson, 285
Tutter v. Inhabitants of Dacorum, 296
Twinne's Case, 414
Tyrwhitt v. Wynne, 204
Tyte v. Jones, 231

V.

Vaughan v. Barnes, 37
Veale v. Bayle, 246
Venning v. Leckie, 217. 250
Vicars Choral of Litchfield v. Ayres, 108
Vicars v. Wilcocks, 304
Vicary's Case, 54
Vincent v. Staymaker, 261
Voocht v. Wynch, 37. 317
Vowles v. Young, 13
Underwood v. Parks, 308
Upsdel v. Stuart, 246

W.

Waddington v. Bristow, 218
Wade v. Beasley, 208
Wadham v. Marlow, 255
Wadsworth v. Hamshaw, 174
Wain v. Warlters, 230
Walford v. Duchess de Pienne, 280
Walker v. Constable, 228
v. Reeves, 285
v. Walker, 164

Walker v. Whitter, 68
Wallis v. Alpine, 309
v. Delancy, 98
v. Wallis, 384
Walpole (Lord) v. Earl of Chelmondeley, 113
v. Shelley, 176
Ward v. Haydon, 148
Walton v. Phillips, 408
Wardel v. Fermor, 97
Warnford v. Warnford, 383
Warner v. Theobald, 288
Warr v. Huntley, 249
Warren v. Corset, 288
Warren d. Webb v. Grenville, 18
Warrington v. Furber, 217
Warwick v. Collins, 448
v. Noakes, 267
Washington v. Brymer, 29
Watkins v. Towers, 207
Watson v. Sutton, 422
v. Threlkeld, 25
v. Turner, 224
Watt's Case, 142. 144
Weal v. King, 213
Weatherstone v. Hawkins, 307
Webb v. Fox, 321
v. Herne, 310. 418
v. Matthew, 420
Webbe v. Maddocks, 219
Weeden v. Timbrel, 354
Weeks v. Sparke, 17. 318
Welch v. Richards, 89.
Weller v. Governors of Foundling Hospital, 145
Wells v. Watling, 319
Wellsford v. Beazley, 229
Westby's Case, 422
Westerdale v. Dale, 285
Westfaling v. Westfaling, 411
Westlake v. Collard, 24
Weston v. Fournier, 434
Wetherhall v. Hall, 291
Whately v. Menhiem, 41
Wheeler v. Leuth, 67
Whitchurch v. Whitchurch, 362
Whitcombe v. Whiting, 278
White v. Driver, 396
v. Hawkins, 346
Whitehead v. Clifford, 239
v. May, 115
Whitlock v. Baker, 18
Whitnale v. Gastham, 123
Whittingham v. Hill, 278
Whitwick v. Hovenden, 275
Whitworth v. Hund. of Grimshoe, 297
Whywall v. Champion, 278
Wicks v. Smallbrooke, 132
Wigley v. Jones, 422
Wilborne v. Dewsbury, 371
Wild v. Horuby, 317
Wilkes v. Atkinson, 239. 244
v. Jacks, 234
Wilkinson v. Colley, 293, 294
v. Lutwidge, 232
v. M'Cauley, 426
Williams v. Burgess, 433
v. Dyde, 366
v. East India Company, 5
v. Frith, 262
v. Hulse, 184
v. Innes, 11
v. Johnson, 173
v. Leper, 223
v. Williams, 65
Williamson v. Allison, 201
Williaume v. Gorges, 29
Willis v. Peckham, 197
Wills's Case, 165
Wilmot v. Horton, 301
Wilson v. Gary, 168
v. Hodges, 378
v. Kemp, 366
v. Milner, 253
v. Paga, 317
v. Rastal, 173, 174
v. Redman, 446
v. Rogers, 99
v. Witherby, 337
Winchester's (Bishop of) Case, 445
Winchester's (Marquis of) Case, 393
Windham v. Chetwynd, 154
Winsmore v. Greenbank, 21. 353, 354
Winter v. Payne, 261
Withnell v. Gartham, 198
Wogan v. Somerville, 308
Wood v. Braddick, 28
v. Folliott, 438
v. Newton, 277
Wood and Chivers' Case, 346
Woodbridge v. Spooner, 113
Woodcock's Case, 19
Woodgate v. Knatchbull, 418

Woodnoth v. Lord Cobham, 16
Woolston v. Scott, 353
Worrall v. Hand, 371
Wright v. Read, 276
v. Smith, 294
Wright dem. Clymer v. Littler, 136. 176
Wrottesley v. Bendish, 54
Wybard v. Tuck, 441, 442
Wyndham v. Lord Wycomb, 353

Y.

Yabsley v. Doble, 22
Yate v. Willan, 210
Yates v. Boon, 282
v. Freckleton, 267
v. Harris, 87
Yea v. Fouraker, 272
Yewen's Case, 135
York v. Blott, 169
Yorke v. Greenaugh, 321
Young v. Bairner, 150. 167
v. Holmes, 94
v. Wright, 21

Z.

Zenobio v. Axtel, 307
Zouch dem. Ward v. Willingale, 343.

A

COMPENDIUM

OF THE

LAW OF EVIDENCE.

CHAP. I.

OF THE GENERAL RULES OF EVIDENCE.

Ch. I. *Introductory Observations.*

IN almost every case which presents itself for the consideration of a court of justice, some fact is disputed by the litigating parties; and the truth being unknown to those who are to decide, recourse must be had to the testimony of others. As this testimony is corroborated or opposed by the good or bad character of the witnesses who give it, by their concurrence, or contradiction of each other; or by the circumstances and probabilities of the story they relate; the mind of the hearer arrives at a greater or less degree of certainty; and, weighing these considerations together, is enabled to pronounce on the truth or falsehood of the fact in dispute.

The law of England has committed the power of estimating the *weight* and *credit* of the testimony so given to twelve persons, indifferently chosen from

Ch. I. *Introductory Observations.*

among the people, and sworn to decide according to the evidence which is laid before them: and as their judgment must in general be formed on the circumstances of each particular case, and can seldom be influenced by the authority of former decisions; I shall have occasion to say but little on this part of the subject.

In some cases, however, our courts of justice have laid down rules for the direction of juries, and have said that the proof of certain circumstances shall be sufficient to raise a *presumption* of other facts which are not expressly proved. Though these rules are founded on general principles of reason, to which the understanding of every man must immediately assent, they may nevertheless be considered as settled rules of *law*, depending on authority; and as such the peculiar study of those whose profession it is to assist in the administration of justice.

There is indeed one species of evidence, the duty of estimating the weight and effect of which belongs wholly to the judge; and in which the jury have no concern whatever. Matters of *record*, if put directly in issue, are tried by the court, and when they come incidentally before a jury are considered as *conclusive* of the facts contained in them, and not to be disputed by any other evidence. The effect of these, therefore, depending entirely on legal reasoning, will necessarily require no inconsiderable part of our attention.

But the principal subject for the consideration of a practical lawyer is the *form* in which evidence is to be produced, and its *admissibility*. This is necessarily in all cases a pure question of *law*; it can never depend on any general and universal principles, but must always be governed by certain, fixed and arbitrary rules. These rules can only be collected from former decisions, and the judge alone is competent to

to determine how far they are applicable to the particular case.

If he mistake the law and admit a witness who is not competent, or evidence which is not admissible; or, on the contrary, reject evidence which he ought to have admitted; the general mode of proceeding, which has of late years been adopted, is to move the court for a new trial. But this is not the only remedy the party has; he may, by *Stat. Westminster* 2, tender a bill of exceptions to the opinion of the judge, which he is obliged to seal, and then the question goes immediately to a court of error. So if the party against whom the evidence is given, admit the legality and truth of it; but contend that it is not sufficient to maintain the issue, and the judge leaves it to the jury, with directions to find against him; he may then, also, tender his bill of exceptions.

But the most usual method, when the evidence is all on one side, is to demur to it, which takes the question to the court, out of which the record issues, without leaving it to the jury. When a party demurs to evidence, he ought to admit the whole effect of the evidence, and not merely the facts which compose it, so that if it be only presumptive, he must distinctly admit every conclusion which the jury might have drawn from it. If he does not do this, the other party is not obliged to join in demurrer; and if he does so join, a *venire de novo* must be awarded, for the court cannot draw the conclusion. The want of attention to this distinction between *evidence* and *facts*, is often productive of much inconvenience in the course of legal proceedings. The finding of facts is the peculiar province of a jury, and if not stated on the record where any matter is submitted to the court for their opinion in point of law; however strong the evidence of those facts may

Gibson *v.* Hunter, 2 H. Black. 187.

Ch. I. *Introductory Observations.*

appear, the court cannot supply this defective finding. The conclusion resulting from the whole should be found and stated by the jury.

On whom the proof lies.

The only use of evidence being to ascertain the truth of disputed facts, it follows, that none is required in support of those allegations which are not denied; and the admission of any fact on the record, or by any other formal act in the course of a cause, not only prevents the necessity of proof, but precludes the party making such admission from offering any evidence to the contrary. But when either party has made an *affirmative* allegation which is denied by his adversary, either by a traverse of that particular fact, or by a general denial of the whole case where that mode of pleading is permitted, the party whose allegation is so denied is in general required to prove it; for the *negative* not admitting in its nature of direct proof, he who denies a fact is not called upon to give that evidence which can only be circumstantial, till some evidence has been given to prove the fact alleged (*a*). This general

Bul. N. P. 298.

(*a*) Though not strictly within the province of a treatise upon evidence to note the course of proceeding to be adopted by counsel on the trial of a cause, yet it may be useful in practice to observe that, in general, the plaintiff's counsel opens his case and calls his witnesses, and the defendant's counsel having done the like for his client, the plaintiff's counsel replies and makes his observations on the whole case. But when the plaintiff's counsel thinks it necessary to call witnesses for the purpose of contradicting some new fact proved by the witnesses for the defendant, the defendant's counsel makes a second speech, confining his observations to the witnesses so called by the plaintiff, and the plaintiff's counsel afterwards makes a general reply. In cases where the defendant calls no witnesses, the plaintiff's counsel has no reply, unless in the case of the attorney-general, or other counsel representing him, when prosecuting for the crown. This is the general course: but if the affirmative be on the defendant, he may begin, and then his counsel has the general

general rule, however, is liable to exception in cases where a man is charged with not doing an act which by the law he is liable to do; for the law presumes that every man does his duty to society, until the contrary is proved; and therefore, in an information against Lord Halifax, for refusing to deliver up the rolls of the auditor of the Exchequer, the court required the prosecutor to prove the negative, viz. that he did not deliver them up. And in a late case, where an action was brought against the East India Company for putting on board the plaintiff's ship a cask containing varnish of a combustible nature, without giving notice of its contents, whereby the cask took fire and destroyed the ship; this exception to the general rule was fully recognized, and the court held that it was incumbent on the plaintiff to prove that the defendants did not give due notice, and that for this purpose he must call either the person who delivered, or him who received, the cask on board the ship, to prove what passed at the time. So where a wife, twelve months after her husband had gone abroad, married a second husband, and had children, no evidence being given that the husband was living at the time of the second marriage, the

Gilb. Law Ev. 148.
Bul. N. P. [298.]

Williams v. East Ind. Co. 3 East, 192.

general reply, as in the case of an ejectment by an heir at law, where the defendant admits the title and sets up a will, which the plaintiff attempts to impeach. *Goodtitle* dem. *Revett* v. *Braham*, 4 T. Rep. 497. So where a landlord having obtained a verdict in ejectment on a forfeiture of a lease, the tenant brought a cross ejectment; the defendant admitting the lease, began by proving acts of forfeiture, and Mr. Justice Lawrence held his counsel to be entitled to the general reply. *Doe* dem. *Chamberlayne* v. *Lloyd*, Heref. Sum. Ass. 1811. And the like was ruled by Mr. J. Le Blanc in replevin, where the defendant did not plead the general issue, but took the affirmative on himself by pleading *liberum tenementum*. *Bulford* v. *Croke*, Oxford Sum. Ass. 1811. The court of Common Pleas has laid it down as a general rule, that the defendant by putting in a rule for payment of money into court, which it was the duty of the plaintiff to admit, shall not thereby entitle the plaintiff to reply. 2 Taunt. 267.

Ch. I.

The evidence must be confined to the issue.

children were held to be legitimate [1], though, according to the general rules of evidence, the presumption would be that the husband was then living [2].

Another rule is, that the evidence must be applied to the particular fact in dispute; and therefore no evidence not relating to the issue, or in some manner connected with it, can be received; nor can the character of either party to a civil cause be called in question, unless put in issue by the very proceeding itself, for every cause is to be decided on its own circumstances, and not to be prejudiced by any matter foreign to it [3]. Therefore, in an ejectment by the heir at law, to set aside a will for fraud and imposition committed by the defendant, he shall not be permitted to call evidence to prove his general good character [4]: but in a similar case before Lord Kenyon at Guildhall [5], where the surviving subscribing witness was called to impeach the will, on account of fraud in obtaining it, his lordship permitted the devisee to call persons to the general good character of the two other subscribing witnesses who were dead.

[7]

In an action for criminal conversation [6], the defendant may give in evidence particular facts of the wife's adultery with others, or her having had a bastard before marriage; because by bringing the action, her husband puts her general behaviour in issue, but he cannot prove any instance of her misconduct, subsequent to the act of adultery [7].

So in criminal cases where the defendant's character is put in issue by the prosecution, the prosecutor may examine to particular facts, for it is impossible without it to prove the charge. Yet there is one case of that sort in which the prosecutor is not allowed to examine to any particular fact without giving previous notice of it to the defendant, and that is where a man is indicted for being a common barrator:

[1] Rex. *v.* Twining, 2 B. & Al. 386.

[2] Vide post, [356].

[3] Vide post, [195], et seq.

[4] Goodright dem. Faro *v.* Hicks, Winton Sum. Assis. 1789, cor. Buller. J. B. N. P. 296.

[5] Doe dem. Stephenson *v.* Walker, 4. Esp. Cas. 50.

[6] Roberts *v.* Malston, per Willes, C. J. Hereford, 1745. Bul. N. P. 296.

[7] Elsam *v.* Faucet, 1. Esp. Cas. N. P. 562.

barrator: and the reason is, because such indictments are commonly against attornies, whose profession it is to follow law suits; and it is difficult to draw the line between that and acting as a barrator; therefore it makes it necessary for him to know what particular facts are to be given in evidence, that he may be prepared to show that he was fairly employed in those cases, and acted in his profession. Bul. N.P. 296.

But in other criminal cases the prosecutor cannot enter into the defendant's character, unless the defendant enable him to do so by first calling witnesses in support of it; and even then the prosecutor cannot examine to particular facts, the general character of the defendant not being put to issue, but coming in collaterally. [8]

The mode in which a defendant in a criminal prosecution is permitted to support his character, is by calling witnesses who have known him for a length of time, and who will say, on their oaths, that his general character has always been good. If a man be indicted for treason, for murder, or for theft, and a number of witnesses say that his general conduct and character has been that of a loyal, a humane, or an honest man; this evidence goes strongly to fortify the presumption of his innocence; and, in a case depending merely on doubtful circumstances, often produces considerable effect on the minds of a jury. But such evidence is only admitted in prosecutions which subject a man to corporal punishment, and not in actions or informations for penalties, though founded on the fraudulent conduct of the defendant (*b*). Attor. General *v.* Bowman, cor. Eyre, C.B. cited 2 Bos. & Pul. 532, n. (*a*).

The

(*b*) In the course of the proceedings on the bill of pains and penalties against the Queen (Tues. Oct. 17.) it appeared that a person of the name of Vimercati, had been employed by the crown as an advocate, to assist in the conduct of the inquiry which was instituted at Milan, previous to the introduction of the bill; and that another person of the name of Codazzi had been em-

Ch. I.

The best evidence must be produced.

The subject of proof being ascertained by the preceding rules, the next thing which must be attended to is, that the best evidence the nature of the case will

ployed as the professional agent of the then Princess. A witness of the name of Omarti was called on behalf of the Queen, for the purpose of proving that he, being the clerk of Codazzi, had been seduced by Vimercati to deliver certain papers belonging to the Princess, which had been deposited in the hands of Codazzi; and on the counsel proceeding to examine him as to a supposed conversation with Vimercati, it was objected to by the Solicitor-General. It was afterwards argued at great length; 1st, That acts and declarations of an agent might be given in evidence, (as to this *vide post*, 20 [17.]); and 2dly, That there was in the present case evidence to show that a conspiracy existed amongst the Italian witnesses, in which case it was contended that the act of any one of the conspirators, (which it was argued Vimercati was,) might be given in evidence to affect the credit of the whole proceeding. When the argument was concluded, two questions were put to the judges, to which was afterwards added a third; and on Thursday, 19 Oct. the Lord Ch. Justice of the King's Bench, delivered the unanimous opinion of the judges on the several points, submitted to them.

1st. They held, that if in the trial of an indictment for any crime, evidence had been given upon the cross-examination of witnesses examined in chief in support thereof, from which it appeared that *A. B.* not examined as a witness, had been employed by the party, preferring the indictment, as an agent, to procure and examine evidence and witnesses in support of the indictment; the party indicted could not be permitted to examine *C. D.* as a witness, to prove that *A. B.* had offered a bribe to *E. F.* in order to induce him to give testimony touching the matter in the indictment (*E. F.* not being a witness examined in support of the indictment, or examined before it was so proposed to examine *C. D.*)

2d. That if in the trial of an indictment for any crime, evidence had been given upon the cross-examination of witnesses examined in chief in support thereof, from which it appeared that *A. B.* not examined as a witness, had been employed by the party, preferring the indictment, as an agent, to procure and to examine evidence and witnesses in support of the indictment; the party indicted could not be permitted to examine *G. H.* as a witness, to prove that *A. B.* had offered him a bribe to induce him to bring to him papers belonging to the party indicted (*G. H.* not having been examined as a witness in support of the indictment.)

3d. That on the prosecution for a crime, the proof whereof was supposed to consist wholly or in part of evidence of a conspiracy entered into by the party then indicted and under trial, so that the conspiracy was to be given in evidence against him; general evidence of the existence of the conspiracy charged might be received in the first instance, although it could not affect such defendant,

will admit of, be produced; for if it appear that better evidence might have been brought forward, the very circumstance of its being withheld, furnishes a suspicion that it would have prejudiced the party in whose power it is, had he produced it. Thus, if a written contract be in existence and in the custody of the party, no parole testimony can be received of its contents; if a subscribing witness has attested the execution of a deed, he, and he alone, is competent to prove it; because no other person can be so fully acquainted with the circumstances of the case, as he who was present at the transaction. But when the law requires the *best* evidence, it does not require *all* the evidence which might be given; if there are two subscribing witnesses to a deed, or a dozen present at the making of a verbal contract, the evidence of any one, while uncontradicted, is sufficient; for the circumstance of the others not being produced, does not incline the mind to suspect that they would not have sworn the same; as the other party might have called them, had he not known that the fact deposed by one was consistent with the truth.

[9]

There are two cases indeed in which our law requires at least two witnesses; viz. on indictments for *perjury* and for *treason*. In the case of perjury the reason is obvious, for if only one witness were to be

The Queen v. Muscot, 10 Mod. 193.

defendant, unless brought home to him, or to an agent employed by him.

4th. That the same rule applied if a defendant sought by such general evidence in the first instance, to affect the prosecutor with a conspiracy to suborn witnesses for the destruction of his defence; provided the proposed evidence were previously opened to the court as in the case of a prosecution to be proved by conspiracy.

The questions put to the Judges being not only general in their nature, but supposing several different cases; the Chief Justice felt himself under the necessity of giving the reasons of the Judges at considerable length.—An abridgment of the result has been here attempted; but the opinion as delivered will be found in the Appendix.

called

Ch. I.

When more than one Witness is required.

called to contradict the oath of the defendant, there would be oath against oath, and both being equally entitled to credit, the jury could not conclude that the defendant had sworn falsely. A reason something like this has been assigned for requiring two witnesses in treason; for it has been said that there is the accused's oath of allegiance to counterpoise the information of a single witness: but the true reason which induced the legislature to require two witnesses in such cases, undoubtedly was, a due regard to the lives and liberties of men; which in heated and intemperate times, would be much more liable to danger from pretended plots and conspiracies, if one witness was permitted to convict them of such offences; and therefore the statute of 7 & 8. W. 3. enacts, that no person shall be tried or attainted of such treason as induce corruption of blood, or of misprison of such treason, but by the oaths and testimony of two lawful witnesses, either both of them to the same overt act, or one of them to one and the other of them to another overt act of the *same* treason, unless the party indicted and tried shall willingly and in open court confess the same, or shall stand mute or refuse to plead, or in cases of high treason shall peremptorily challenge above the number of thirty-five of the jury: and by another section it is enacted, that if two or more *distinct* treasons of *divers kinds* are alleged in one indictment, one witness produced to prove one of the said treasons, and another witness to prove another of the said treasons, shall not be deemed to be two witnesses to the same treason, within the meaning of the act. This act was little more than a re-enactment of the provisions of two former statutes; though it may be proper to observe, that petit treason is particularly mentioned in the first of them, and therefore two witnesses are still required to prove that offence, and every other species

Vide 4 Black. Com. 357. [10]

7 & 8 W. 3, c. 3, s. 2.

Sect. 4.

1 Edw. 6, c. 12, s. 22. 5 & 6 Edw. 6, c. 11, s. 12.

When more than one Witness is required.

species of treason, unless where the general provisions of these statutes have been restrained by other statutes. This has been done in the cases of treason concerning the current coin or counterfeiting the king's signet, privy seal, and great seal or sign manual, or bringing counterfeit coin into the realm, or for any offence by impairing, counterfeiting, or forging the current coin, which has been held to extend to all offences touching impairing the coin, which should afterwards be made treason. And by a late statute made for the immediate protection of the late king's life, it is enacted, that in all cases of high treason, when the overt act alleged in the indictment, is the assassination of the king, or any direct attempt against his life, or against his person, the prisoner shall be tried according to the same order of trial and upon the like evidence as if he stood charged with murder.

1 & 2 Phil. & Mary, c. 10, s. 12; same year, c. 11, s. 3. Gahagan's case, 1 Leach. Crown Law, 50.

39 & 40 G. 3, c. 93.

The law never gives credit to the bare assertion of any one, however high his rank or pure his morals, but always requires the sanction of an oath (*c*): It

(*c*) In the court of Chancery a peer of the realm puts in his *answer* upon *honour*, but his *affidavit*, *answer to interrogatories*, and *examination as a witness*, must be on *oath*. *Meers* v. *Lord Stourton*, 1 P. Will. 146. See also *Lord Shaftesbury* v. *Lord Digby*, 2 Mod. 99; and if one who is sitting as judge or juryman happen to know a fact with which the other judges or jurors are unacquainted, he is sworn and openly examined as to the fact, the same as any other witness, and equally liable to cross-examination. Vide 2 St. Tr. 809; 3 St. Tr. 141; 5 St. Tr. 98; Kel. 12.

Though the party has a right to insist on the examination of witnesses on oath, he may waive this right, and bind himself by their declarations. Thus, in an action for goods sold and delivered, the defendant having said, that he would pay the money, if *A.* would declare that he had delivered the goods; the declaration of *A.* that he had delivered them, was held by Lord Ellenborough to be evidence against the defendant, after the death of *A.* *Daniell* v. *Pitt*, Sittings after Mich. Term, 1806. And in subsequent cases it has been holden that such declarations may be given in evidence even during the life-time of the person making it. Vide *Williams* v. *Innes*, 1 Campb. 364, and other cases there cited, and the note *post* [149].

further

Ch. I. *Hearsay Evidence.*

further requires his personal attendance in court, that he may be examined and cross-examined by the different parties; and, therefore, in cases depending on parol evidence, the testimony of persons who are themselves conusant of the facts they relate, must in general be produced; for the relation of one who has no other knowledge of the subject than the information which he has received from others, is not a relation upon oath; and, moreover, the party against whom such evidence should be permitted, would be precluded from his benefit of cross-examination. The few instances in which this general rule has been departed from, and in which *hearsay* evidence has been admitted, will be found, on examination, to be such as were, in their very nature, incapable of positive and direct proof. Of this kind are all those which can only depend on *reputation*. The excluding of hearsay evidence in questions of *pedigree* or *custom*, would prevent all testimony whatever; for the evidence of any living witness of what passed within the short time of his own memory, would often be insufficient in the former instance, and could never avail in the other, where the usage and understanding of ancient times must be proved, to establish the right which is claimed. In these cases, therefore, the law departs from its general rule, and receives evidence of the declarations of deceased persons, who, from their situation, were likely to know the facts; and also the general reputation of the place or family most interested to preserve in memory the circumstances attending it. Any thing which shows such *reputation* is, on a question of this sort, received in evidence, though oftentimes wholly inadmissible in other cases.

[11]

Therefore, if a question arise as to the *legitimacy* of *A*. declarations of his father and mother deceased, as to whether they were married, and whether the party

[12]

party was born before or after marriage, are good evidence, but not to prove that the child born in wedlock is illegitimate for want of access[1]. So, to prove the *state of a family*, as who a man married, what children he had, whether legitimate or illegitimate, that *A.* died abroad, &c. declarations of deceased members of the family, whether connected by blood or by marriage, are admissible, but those of deceased neighbours or acquaintances are not so[2]. In these cases also, the recital in deeds[3], the finding of a special verdict between other members of the family, stating a pedigree, inscriptions on old gravestones, heralds books, entries in family bibles, the statement of a pedigree in a bill (*d*) in chancery,[4] a paper

[1] Stevens *v.* Moss, Cowp. 491. See this case more at large, c. 3, s. 4.

[2] Vowles *v.* Young, 13 Ves. jun. 140. Whitlock *v.* Baker, Ibid. 511.

[3] B. N. P. 233, 294, 5.

[4] Taylor *v.* Cole, 7 T. R. 3, n. (*a*)

(*d*) It has been supposed, (*vide* Phillipps's Law of Evidence, 2d ed. 263, and 4th ed. 356,) that these cases have been overruled by the decision of the House of Lords, and the answers of the judges in the Banbury Peerage case. In answer to a question put to the latter, they delivered their opinion, that a bill in equity, "*filed for the purpose of establishing the legitimacy of a particular person*, or depositions taken under it, cannot be received in evidence in the courts below, on the trial of an action of ejectment against a party not claiming or deriving title under the plaintiff or defendant in the Chancery suit, either as evidence of the facts therein deposed to, or as declarations respecting pedigree." It should here be observed, that the bill in the case referred to them, itself showed that the legitimacy of the plaintiff was a matter of dispute, so that it was impossible to consider it as the admitted reputation of the family, that the party was legitimate. But in the case referred to in the text, the pedigree formed no part of the controversy, but was merely the statement of the party's situation to show that he was in a condition to contend for the right which was disputed; and it must be observed, that in answer to the same question, which was general, "whether any bill in Chancery could be received in evidence in a court of law to prove any facts either alleged or denied in such bill," the judges said, that "generally speaking, a bill in Chancery cannot be read in evidence in a court of law, to prove any fact either alleged or denied in such bill. But whether any possible case might be put which would form an exception to such general rule, the judges would not undertake to say." *Vide* 2 Selw. N. P. 684. And in the subsequent case of the Berkeley Peerage, Mr. Justice Lawrence said, "it is reasonable only that such declarations should be received as have in their favour a presumption of being consistent with the truth. This presumption must depend on circumstances; and if the

Ch. I. *Hearsay Evidence.*

paper writing purporting to be an old will in a cancelled state, which never appeared to have been acted upon, but which was found amongst the title deeds of a former possessor of the estate[1], or the like, are good evidence. But where there is no question about the parents of a person, but merely as to the place of his birth[2], the declarations of his parents or others as to that fact, are not admissible.

In questions about a *right of way* also, reputation has been received [3]; and to prove a piece of land *parcel of an estate*, declarations made by a deceased tenant, at the time he was possessed, of whom he held, may be given in evidence [4]. So entries by a steward, since deceased, of money received by him of different persons in satisfaction for trespasses committed on the waste [5], or by deceased officers of a township of the receipt of money from the officers of another township,

[1] Doe d. Johnson *v.* Earl Pembroke, 11 East, 504.

[2] Rex *v.* Inhabitants of Erith, 8 East, 539.

[3] B. N. P. 295.

[4] Davis *v.* Pearce, 2 T. R. 53.

[5] Barry *v.* Bebbington, 4 T. R. 514. Doe d. Webber *v.* Ld. G. Thynne, 10 East, 206.

the relator has no interest to serve, or any object to answer, as may be the case, where declarations are made subsequent to the commencement of a suit; and if there is no ground for supposing that the relator's mind had any bias, it is not unreasonable to conclude that he has not exceeded or stopped short of the limits of truth. In such a case, the admission of their declarations, though without the sanction of an oath, and without any opportunity of cross-examination, may be attended with less inconvenience than would follow from a total rejection of the evidence; but where a dispute or doubt exists, and members of the family are produced, and even examined on oath, as witnesses in a cause; such a proceeding destroys all the weight and credit which is due to an unbiassed declaration, and is not admissible against a person who was no party to the suit, much less would any verbal declaration or written memorandum, made under such a bias, be admissible. *Vide* 2 Selw. 684. On the same principle, where the owner of a particular farm was called upon to repair a road, Mr. J. Dampier refused to admit an award made many years before, as evidence of his liability; for the accounts which deceased witnesses might have given to the arbitrator could not have been received, as being made *post litem motam*; and if *they* were not admissible, his opinion, founded on such testimony, could be entitled to no greater degree of weight. But, on the contrary, where depositions taken on *one* custom of a manor, incidentally mentioned *another*; they were considered admissible, even as declarations, because there was no dispute respecting the custom they were to support. *Freeman* v. *Phillips*, post [64.]

township, for a proportion of the church rates [1], have been deemed admissible evidence to prove that the right to the soil in the one case, and the liability of the township paying to repair in the other; for in these cases the entry was made at a time when no dispute existed, by persons who thereby charged themselves with money, and were in fact acting against their own interest. So an entry made by parish officers that a particular pew was repaired by an individual as belonging to his house, has been held to be evidence for a future occupier of the house to prove his right to the pew [2]. Even declarations of deceased parishioners at a time when no dispute existed as to the boundaries of a parish [3], have been received in evidence; and in one case, the court of Exchequer received the declarations of deceased parishioners as to a general modus throughout the parish (though the relator held land [4]), but this case stands by itself, and seems rather contrary to the general principle, which requires that the party should have no interest when he makes the declaration. In the case of tithes, where a particular modus is set up, the entries of a former incumbent or his collector have been in several instances admitted [5]; for having no interest beyond his own incumbency, he cannot be supposed to have made false entries for the mere purpose of furnishing evidence for his successors. This last authority was recognised by Lord Kenyon; but his Lordship said, that the case of an incumbent was always considered as an excepted case; and therefore entries made in a book by the owner of land, of money paid him by a particular tenant [6], were held to be no evidence after his death to prove his property in the land.

But in a subsequent case [7], where the book of the lessee of an impropriate rectory was offered as evidence, to show that he had been in the receipt of a certain

[1] Stead *v.* Heaton, 4 T. R. 669.

[13]

[2] Price *v.* Littlewood, 3 Campb. 288.

[3] Rex *v.* Inhabitants of Hammersmith, Appendix.

[4] Harwood *v.* Sim, Wightw. 112.

[5] Legrosse *v.* Levemore, 2 Gwill. 527; Ld. Arundell's case, 12 Vin. 255, per Ld. Hardw. 2 Ves. 43.

[6] Outram *v.* Morewood, 5 T. R. 121.

[7] Illingworth *v.* Leigh, 4 Gwil. 1615.

[14]

Ch. I. *Hearsay Evidence.*

a certain description of tithe claimed by the vicar, the court of Exchequer admitted such book notwithstanding the decision in the above case, and the observation of Lord Kenyon was strongly impressed upon them; and in a former case [1], it had been holden, that the entries of the steward of a former proprietor of the land, of *payments* made by him, were evidence for the present owner to prove a modus.

[1] Woodnoth *v.* Lord Cobham, Bun. 180.

Here a distinction should be attended to between hearsay evidence of mere *facts*, and of *general reputation*. In cases of *pedigree*, declarations of deceased members of the family, as to the birth, marriage or death of any member of it, are admitted, for this is general reputation; but the place of birth being a particular fact, we have before seen that hearsay evidence respecting it was rejected. In cases of *custom* also, which can only be supported by a variety of facts and by long and uniform usage, the general reputation only can be proved by hearsay evidence, a witness may be permitted to state what he has heard from persons since deceased, respecting the reputation of the right; but not to state facts of the exercise of it which the deceased persons said they had seen [2]. Thus in a case [3] laid before Mr. Justice Chambre at Shrewsbury, where the question on the record was, whether a turnpike was erected within or out of the limits of the town of Wem; that learned judge permitted the plaintiff, who contended that it was within the town, to give evidence of general reputation, that the town extended to a piece called the Townend Piece; and that old people, since deceased, said, that such was the boundary of the town; but he would not suffer it to be proved that those persons had said that there were formerly houses where none then stood, observing, that this was evidence of a particular fact and not of general reputation.

[2] Per Grove, J. in R. *v.* Eriswell, 3 T. R. 707.

[3] Ireland *v.* Powell, Salop Sp. Ass. 1802.

[14]

But

But though this has been established in cases of *pedigree* and *custom*, yet great difference of opinion formerly prevailed as to the admissibility of such evidence in questions of *prescription* or other rights merely private, some judges being in the habit of receiving it when a foundation had been laid by other evidence, but giving little weight to it in their direction to the jury; others, on the contrary, totally rejecting it. It seems now however to be clearly settled that such evidence is not admissible; and indeed the whole ground on which general reputation is admitted supports this latter opinion. Reputation in its very nature can only be the common and general understanding of a number of persons: a whole family may have a common reputation concerning the birth, death, or relationship of any of its members. A whole township may have a common reputation concerning its boundaries, or the rights of its individual members, as members of the body; but there can be no general or common reputation as to the rights of an individual or the appurtenances of a particular estate. In this case, therefore, it becomes mere *hearsay* and not *general reputation*, and is inadmissible on the same principle as hearsay of particular facts in cases of public right. This distinction will not militate against those cases in which the entries of deceased persons, charging themselves with sums of money, were received as evidence; for they, as before observed, were not received merely as hearsay of a particular fact, but as declarations made by persons who, by the very act of making them, furnished evidence against themselves.

See the several cases in the Appendix, No. 1. particularly Doe d. Didsbury *v.* Thomas, 14 East, 323. Weeks *v.* Sparke, 1 M. & S. 679. Blacket *v.* Lowes, 2 M. & S. 494.

Indeed, in many other cases, the law receives the memorandum in writing, made at the time by a person since deceased, *in the ordinary way of his business*, and which is corroborated by other circumstances

Ch. I. *Dying Declarations.*

as evidence of the fact it records (*e*). And in prosecutions for murder where the deceased, while in the

declared

(*e*) Where it appeared that the plaintiff's draymen (he being a brewer) were used to come every night to the clerk of the brew-house, and give an account of the beer delivered out, which he set down in a book, and the draymen signed it; this, with proof of the drayman's hand-writing, was held to be evidence of the delivery after his death. (*Lord Torrington's* case, Salk. 285. *Pitman* v. *Maddox*, ibid. 690). But in another case, where the plaintiff only proved the servant's hand-writing, Lord Ch. J. *Raymond* held it insufficient, saying, that it differed from Lord Torrington's case, because there the witness saw the draymen sign the book every night. (*Clerk* v. *Bedford*, Mich. 5 Geo. 2. B. N. P. 282). It is observable that the stat. 7 Jac. c. 12, enacts, that the shop-book of a tradesman shall not be evidence after a year, whereas it is not at any time of itself evidence. Lord *Hardwick* (2 Ves. 43.) observed, that at the time this act of parliament was made, there was an opinion growing up that after a certain length of time a man's own shop books should be evidence for him after a year; to prevent which was that act made, as he had been informed by Lord Raymond upon consulting him. It was to take away that opinion that after the year it might be evidence.

So an entry made by a banker's clerk, of his having paid a check, was not permitted to be read as evidence of such fact, though the clerk was resident in a foreign country. *Cooper* v. *Marsden*, Sittings after East. Term, 1793, MS. 1 Esp. N. P. Cas. 1, S. C.

But in an action for a watch delivered to a watchmaker to be cleaned, the servant having sworn that he saw his master deliver it to a third person by the owner's orders, and such third person having sworn that he never received it, Lord Kenyon permitted the master's day-book, containing an entry made by *himself* at the time, in the ordinary course of business, to be read in confirmation of the servant's testimony. *Digby* v. *Stedman*, 1 Esp. N. P. Cas. 329.

Notice having been given to produce a letter of a particular date, and the party having acknowledged the receipt of it, but refusing to produce it, Lord Ellenborough permitted a copy made by a deceased clerk in a regular letter-book, to be read as evidence of its contents. *Pritt* v. *Fairclough*, 3 Camp. 365.

Where an estate had been enjoyed many years under a recovery suffered by a remainder-man, and no surrender of the life estate could be found, the entry in the attorney's bill-book, made at the time, containing charges for drawing and engrossing the surrender (which bill had been paid) was, after the death of the attorney, received as evidence of the surrender. *Warren* d. *Webb* v. *Grenville*, 2 Stra. 1129. So where a man midwife made an entry in his book of having delivered a woman on a certain day, referring to his ledger in which he had made a charge for his attendance, which was marked as paid; such entry was received in evidence upon an issue as to the age of the child at the time of his afterwards suffering a recovery. *Highham* v. *Ridgeway*, 10 East, 109. And

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declared apprehension of death, or in such imminent danger of it as must necessarily have raised that apprehension in his mind, has made a relation of the manner in which the offence was committed, such relation has been received as evidence against the prisoner, though the person making it was not formally sworn; for, as was observed by Lord C. B. *Eyre* in a case of this kind, "when the party is at the point of death, and when every hope of this world is gone, when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn, and so awful, is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice." But in cases where the party making the declaration is so infamous as not to be competent to give evidence if sworn, the mere circumstance of his approaching death does not give credit to his

Woodcock's case, Leach, 563. [16]

Ib. 567.

Drummond's case, ib. 378.

in a very late case an attorney's book charging for engrossing and registering a lease on a particular day, which was after its date, was received as evidence to show the exact day of its execution. *Doe d. Rees v. Robson*, 15 East, 32.

Upon an issue out of Chancery, to try whether eight parcels of Hudson's Bay stock, bought in the name of Mr. Lake, were in trust for Sir Stephen Evans; his assignees (the plaintiffs) showed first, that there was no entry in the books of Mr. Lake, relating to this transaction. Secondly, six of the receipts were in the hands of Sir Stephen Evans, and there was a reference on the back of them by Jeremy Thomas, (Sir Stephen's book-keeper) to the book B, B. of Sir Stephen Evans. Thirdly, Jeremy Thomas was proved to be dead, and upon this the court of King's Bench, on a trial at bar, admitted the book referred to, in which was an entry of payment of the money, not only as to the six, but likewise as to the other two, in the hands of Sir Biby Lake, the son of Mr. Lake. Bul. N. P. 282.

Another case, similar to the above, was *Smartle v. Williams*, where the question being whether mortgage money was really paid, a scrivener's book of accounts was after his death received as evidence of the payment. *Vide* Bul. N. P. 283. This case is reported in Salk. 245, 280, but the point is not there mentioned. It must be understood, that in this, as in the other cases, some circumstances were proved to lay a foundation for this book being received.

Ch. I. *Admissions of the Parties.*

relation; and therefore the dying declaration of a thief at the gallows is not received as any evidence whatever.

What a party has himself been heard to say, does not fall within the objection as to hearsay evidence. Any thing, therefore, which he admits, whether he is suing in his own right, or merely as trustee for another, or which another [1] asserts in his presence, and he does not contradict, is received as evidence against him. The like evidence may be given of any admission made by a person on whose behalf an action is brought, as where a bond is conditioned to pay a sum of money to *A.* though *A.* is no party to the record, yet any acknowledgment made by him respecting the matter in dispute will be evidence [2] (*f*). But when such admission is offered in evidence against a man, the whole of his account must be taken together [3]; and therefore if he admit certain sums of money to be due to the plaintiff on a particular transaction, but at the same time assert (or in a written account set down) that such sums were liable to certain deductions, as where an agent admits having received a certain sum of money for timber sold, but charges another sum for the demurrage of the ship which brought the timber, his admission shall be taken against him only for the balance; and the plaintiff, if he mean to dispute the propriety of the countercharge, will be under the necessity of calling witnesses on his part to dispute it. So if he admit the receipt of a sum of money, but say at the same

[1] Bauerman *v.* Radenius, 7 T. Rep. 663.

[2] Hanson *v.* Parker, 1 Wilson, 257. Smith *v.* Lyon, 3 Campb. 465.

[3] Randall *v.* Blackburne, 5 Taunt. 245.

12 Vin. Abr. (A. b.) 23.

(*f*) In *Rex* v. *Inhabitants of Woburn*, 10 East, 395, the court of King's Bench held, that a rated inhabitant of a parish, between which and another parish an appeal was pending, was so far to be considered as a party to the appeal as not to be compellable to give the evidence under the stat. 46 Geo. 3, c. 37, (*vide* post, c. 3, s. 5,) and considering him as such party, they, in two subsequent cases, admitted the declarations of such rated inhabitant as evidence against the parish wherein he was rated, though he was not named as a party in the appeal. *Rex* v. *Inhabitants of Hardwick*, 11 East, 589. *Rex* v. *Inhabitants of Whitley Lower*, 1 M. & S. 636.

same time that he paid it, this is no proof of a debt. No evidence is received of what is said by the wife of the party, or by any other person, in his absence, unless in cases where it appears that they were employed or entrusted by him in the management of a business. Thus [1] an acknowledgment of a fact by the attorney in the cause is no evidence of that fact, unless made with the express view of obviating the necessity of proving it on the trial; and even the wife's acknowledgment of her having received wages, which she had personally earned, was, in one case [2], held to be no evidence against her husband, in an action brought by him for those wages; and in another [3], where the husband and wife, who was executrix, joined in an action for a debt due to the testator, it was also held that no evidence could be received of declarations of the wife after her marriage. So a promise made by her during the coverture, will be no evidence to revive a debt due from her before marriage, so as to take the case out of the statute of limitations [4]. If this evidence is not admissible where the wife is a party, or the meritorious cause of action, the rule applies with greater force where the cause of action arises from her delinquency; and therefore in an action for enticing away the plaintiff's wife, her declarations made at a subsequent time are inadmissible [5]; but if at the time of her elopement she stated as a reason for so doing, that she was apprehensive of personal violence from her husband, and the defendant crediting her story received her into his house [6], such declaration is admissible in evidence as part of the *res gesta* to show that the defendant did not harbour her from improper motives.

[17]

[1] Young *v.* Wright, 1 Campb. 140.

[2] Hall *v.* Hill, 2 Stra. 1054.

[3] Alban and others *v.* Pritchet, 6 T. Rep. 680.

[4] Vide Morris *v.* Norfolk, 1 Taunt. 213.

[5] Winsmore *v.* Greenbank, Willes, 577.

[6] Philp *v.* Squire, Peak. N. P. Cas. 82. See also 6 East, 169.

Indeed, where the wife originally made a contract which was afterwards either expressly or tacitly ratified by the husband, her declarations have been

Ch. I. *Admission of Agent.*

received as evidence to charge him; and, therefore in an action for nursing the defendant's child, his wife's admission that she had agreed to pay 4s. a week, was allowed to be given in evidence, the Chief Justice (Pratt) observing, that matters of this kind were properly under the directions of the wife [1]; and in like manner the admissions made by an under-sheriff [2], or bailiff, to whom the warrant is directed [3], have been received as evidence against the sheriff, in an action against him for an escape, because he is answerable for the acts of his under-sheriff, or bailiff, and they give bond to him for the due performance of their duty.

[1] Anonymous, 1 Stra. 527. See also Emerson *v.* Blendon, 1 Esp. Cas. 142.

[2] Yabsley *v.* Doble, 1 Ld. Raym. 190.

[18]

[3] North *v.* Milles, 1 Campb. 389.

But though in the cases which have been just mentioned, the admissions of the *wife*, the *under-sheriff*, and the *bailiff* were received in evidence, it may still be doubted [4], whether they were rightly received further than as part of the *res gesta*, and we may now consider it as clearly settled, that the admissions of a mere servant are only receivable to that extent. In one case [5], indeed, where a person who was proved to be the captain of the defendant's ship, on board of which the plaintiff had delivered goods, had by letter acknowledged the receipt of them, such letter was held by Mr. J. *Buller* to be good evidence of the delivery. The propriety of this decision was afterwards questioned; and the cause being determined in favour of the defendant, on another ground, the court gave no opinion of this point; but, in a subsequent case [6], Lord *Kenyon*, alluding to this decision, expressed a doubt whether the evidence was properly admitted [7]; and that learned judge is said to have frequently held at Nisi Prius, that the agent must himself be called as a witness; and, in several late cases [8], it has been held, that letters of an agent abroad, even to his principal, containing an account of a by-gone transaction, were not evidence against

[4] Vide Bowsher *v.* Cully, cited 1 Campb. 391.

[5] Biggs *v.* Lawrence, 3 T. Rep. 454.

[6] Bauerman *v.* Radenius, 7 T. R. 668.

[7] Ib. 665.

[8] Kahl *v.* Jansem, 4 Taunt. 565. Reyner *v.* Pearson, 4 Taunt. 663. Langhorne *v.* Alnutt, 4 Taunt. 511.

against such principal to prove the facts stated in them. These cases, however, must be understood as applicable only to mere admissions of *antecedent facts*, and not to what an agent says at the time he does an act in the regular course of his business, for, in the latter case, his words being part of his act are clearly admissible against his principal.

Thus, if a person who is the acknowledged agent of another, make a contract by letter or other writing, proof of his hand-writing is sufficient evidence of his contract, without calling him as a witness[1]. So where a man having made a policy of insurance on the life of his wife[2], (who had taken a journey to Manchester, for the purpose of procuring the certificate of a surgeon as to her health, preparatory to making the insurance) she was soon after confined to her bed by illness, in which state she was visited by a friend; to whom she stated that she was poorly when she went to Manchester, and that she was afraid she should not live till the policy was completed. Shortly after this she died, and an action being brought by the husband on the policy, the court held that the declarations so made by the wife were admissible in evidence on the part of the defendant, as showing her opinion of the ill state of her health at the time of effecting the policy. The admission of a person who is proved to have been a partner with the party in the cause by other evidence, may also be received against his partner though made after the dissolution of the partnership.

[19]

[1] Daniel v. Hill, B. R. Tr. 47 Geo. 3.

[2] Fairlie v. Hastings, 10 Ves. ju. 126. S. P.

[3] Avison v. Lord Kinnaird, 6 East, 188.

Wood v. Braddick, 1 Taunt. 104.

Potherick v. Turner, ib. 105.

A distinction has been made between an admission and an offer of compromise, after a dispute has arisen. An offer to pay a sum of money in order to get rid of an action, is not received as evidence of a debt: the reason often assigned for it by Lord *Mansfield* was, that it must be permitted to men "to buy their peace," without prejudice to them if such

Offer of Compromise.

Bul. N. P. [236.]

Ch. I. *Offer of Compromise.*

offer did not succeed; and such offers are made to stop litigation, without regard to the question, whether any thing, or what is due. Therefore if *A.* sue *B.* for 100*l.* and *B.* offer to pay him 20*l.* it shall not be received in evidence; for this neither admits nor ascertains any debt, and is no more than saying, he would give 20*l.* to get rid of the action; but if an account consist of ten articles, and *B.* admit that such a one is due, it will be good evidence for so much.

Westlake *v.* Collard, Bul. N. P. [236.] Slack *v.* Buchannan, Peake's Cas. 5.

Admissions of *particular articles* before an arbitrator are also good evidence, for they are not made with a view to compromise, but the parties are contesting their different rights as much as they could do on a trial.

Confession of a Felon.

On the same principle, the confession of a felon voluntarily made is evidence against him on his trial; but if any threats or promises have been made to induce him to confess, no evidence of such confession is admitted; for a man, under such influence, might be tempted to confess what was not true, in the hope of being discharged from prosecution, or of

[20]

receiving a slighter punishment than if he were convicted on other evidence; yet, if in consequence of the confession so obtained, the stolen property be found, evidence of that *fact* may be admitted, though the confession as to the circumstances under which it was taken, cannot be given in evidence.

Rex *v.* Warwickshall, Leach. Cro. Law, 299.

Acts amounting to Admissions.

In like manner as what a man says will be evidence against him of the fact so admitted; acts done by him will sometimes preclude him from disputing his situation. If a man hold himself out to the public as filling any particular station, he prevents the necessity of evidence against him to prove that he is legally entitled to it. Thus, if a clergyman receive tithes, and an action is brought against him for non-residence, the proof of his having so received tithes, and

Bevan *v.* Williams, 3 T. Rep. 635. n.

and acted in the character of parson, is sufficient evidence that he is so; or if an innkeeper write over his door that he is licensed to let post-horses [1], and afterwards commit an offence against the post-horse act, there needs no other evidence of his being licensed, than the information so held out by himself to the public. If a man live with a woman to whom he is not married, and suffer her to pass in the world as his wife [2], he will be answerable for such contracts made by her, as would be binding on him if made by a woman to whom he was actually married; for in all these cases the person avails himself, as far as is in his power, of the legal benefits of the situation, and therefore the law considers his own acts as conclusive evidence to charge him with the duties of it.

[1] Radford *v.* Briggs, 3 T. Rep. 637.

[2] Watson *v.* Threlkeld, 2 Esp. Cas. 637.

[21]

So in many cases where one man treats with another, as filling a particular station, and derives a benefit from him, he will not afterwards be permitted to dispute his title, as if a farmer take his tithes by permission of the clergyman, or a person letting out post-horses account with another as farmer of the duty [3], the person so admitting the title of the other and acting under it, will not be permitted afterwards to call on him to prove it: and in like manner where *A.* rented the glebe lands of a rectory of *B.* the incumbent, and paid him rent [4], he was not permitted in an action for use and occupation to dispute the title of his lessor by proving that his presentation was simoniacal. So where two persons who were alien enemies, carried on trade at Lisbon under the name of a third, who was a Portuguese, which country was in amity with this country, and on a cargo which they had shipped being captured and libelled as enemy's property, they permitted such third person to claim the goods in the Admiralty Court as his own, and to obtain a decree for the restitution of them to him; the persons who had thus colluded with a third

[3] Radford *v.* M'Intosh, 3 T. Rep. 632.

[4] Cooke *v.* Loxley, 5 T. Rep. 4.

Ch. I. *Presumptive Evidence.*

third to deceive the court, were held to be estopped from afterwards maintaining an action for money had and received against him to recover the value of the goods[1].

[1] De Mitton v. De Mello, 12 East, 234.

Most of the foregoing cases may be classed under the head of presumptive evidence; for there was no proof of the particular fact; but the conduct of the party afforded such pregnant evidence of it, that he was precluded from denying it. This is the most violent presumption; but there are other presumptions which are only probable, and therefore may be rebutted; for in all cases where positive and direct evidence is not to be obtained, the proof of circumstances, and facts consistent with the claim of one party, and inconsistent with that of the other, is deemed sufficient to enable a court of justice, or more correctly speaking, a jury under its direction, to *presume* the particular fact which is the subject of controversy; for the mind, comparing the circumstances of the particular case with the ordinary transactions of mankind, judges from those circumstances as to the *probability* of the story, and for want of better evidence, draws a conclusion from that before it. Long and undisputed possession of any right or property, affords a presumption that it had a legal foundation, and rather than disturb men's possessions, even records have been presumed.

[22]

[2] Be dle v. Beard, 12 Co. 5. Powell v. Milbank, cited Cowp. 103, and 1 T. Rep. 399.

[3] Lady Dartmouth v. Roberts, 12 East, 334, sed vide post, [414].

[4] Mayor of Kingston upon Hull v. Horner, Cowp. 102.

Thus where there had been a long and uninterrupted enjoyment of a rectory, which originally belonged to the crown, a grant was presumed[2], as was a conveyance of tithe hay, before the restraining statutes, though an ancient endowment was shown[3]; and where a corporation had for three hundred and fifty years been in the receipt of port duties, which could only originate in a grant from the crown, such grant was also presumed[4], as was an enfranchisement of lands, originally copyhold, which had long been

been occupied and treated as freehold [1](g). And where a lord of a manor entered into an agreement with several customary tenants as to the terms on which they should in future cut their wood, a subsequent different course of cutting by the occupiers of one of the estates with the knowledge of the lord, was held to be admissible, though not very

[1] Roe dem. Johnson v. Ireland, 11 East, 280.

(g) In like manner a recovery has been presumed after a very long possession, *Haselden* v. *Bradney*, Tr. 11, 12 Geo. 2, B. R. cited 3 T. Rep. 159, and now by stat. 14 Geo. 2, c. 20, it is expressly provided, "That all common recoveries suffered or to be suffered without any surrender of the leases for life, shall be valid: provided it shall not extend to make any recovery valid, unless the person entitled to the first estate for life, or other greater estate, have or shall convey, or join in conveying an estate for life, at least to the tenant to the *præcipe*." And by the same act, where any person has or shall purchase for a valuable consideration any estate, whereof a recovery was necessary to completes the title, such person, and all claiming under him, having been in possession from the time of such purchase, shall and may, after the end of twenty years from the time of such purchase, produce in evidence the deed making a tenant to the *præcipe*, and declaring the uses; and the deed so produced (the execution thereof being duly proved) shall be deemed sufficient evidence that such recovery was duly suffered, in case no record can be found of such recovery, or the same should appear not regularly entered: provided, that the person making such deed had a sufficient estate and power to make a tenant to the *præcipe*, and to suffer such common recovery. It is further enacted, that every common recovery suffered, or to be suffered, shall, after the expiration of twenty years, be deemed valid, if it appear upon the face of such recovery that there was a tenant to the writ, and if the persons joining in such recovery had a sufficient estate or power to suffer the same, notwithstanding the deed to make a tenant to such writ shall be lost. It is further enacted, that every recovery shall be deemed valid, notwithstanding the fine or deed making a tenant to such writ shall be levied or executed after the time of the judgment given, and the award of same: provided the same appear to be levied or executed before the end of the term in which such recovery was suffered, and the persons joining in such recovery had a sufficient estate and power to suffer the same. This act only extends to cases where the party suffering the recovery, had a sufficient estate to enable him to do so, and does not alter the rules of evidence in the case of a recovery, suffered by a tenant in tail in remainder during the existence of the estate for life. In such case if the possession has long gone according to the recovery, a surrender of the life estate will be presumed; but if disputed recently after the death of the person who was entitled to hold without the aid of the recovery, it will not. *Bridges* v. *Duke of Chandos*, 2 Burr. 1065.

strong

Ch. I. *Presumptive Evidence.*

strong evidence, to show that the deed had been departed from, and some subsequent grant made authorizing such mode of cutting by the tenant of the particular estate[1]. So the production of an original lease for a long term, and proof of possession for seventy years, has been held sufficient evidence of an assignment[2]; and possession for twenty years, and an assignment of an old term of two thousand years, sufficient to presume the original grant of the term[3]. In like manner if a landlord give a receipt for rent due at Michaelmas, and afterwards claim rent due at Lady-day preceding, it furnishes a still stronger presumption that such preceding rent has been paid; and where a stale demand is made in a court of justice, the very circumstance of its coming late, in all cases inclines the mind to suspect that it has not a just foundation, and in many has been taken as complete evidence of the non-existence or payment of it; but these latter cases resting on presumption, and not on positive proof, very slight evidence is sufficient to rebut and overturn them, and to call on the different parties to establish their respective rights by the ordinary rules of evidence.

Where a bond has not been put in suit, or interest paid upon it, for twenty years, the law calls upon the obligee to give some reason for the delay, and in default of his doing so, presumes that it has been paid; and the same rule applies to a *scire facias* brought for execution on a judgment[4]; but in the case of a small demand, which the party had no particular interest to collect, the rule does not apply, and therefore it has been held, that mere length of time, short of the statute of limitations, unaccompanied by other circumstances, is not sufficient to found a presumption of a release of a quit-rent[5].

In the case of the bond, the payment of interest, or any other sufficient reason why the action was not sooner

[1] Blackett *v.* Lowes, 2 Maule & Selwyn, 494.

[2] Earl dem. Goodwin *v.* Baxter, 2 Blac. 1228.

[3] Denn dem. [24] Tarzwell *v.* Barnard, Cowp. 595.

[4] Forbes *v.* Wale, 1 Blac. 532. Colsel *v.* Budd, 1 Campb. 27. Curteis and another *v.* Fitzpatrick and another, K. B. aft. M.T. 1796.

[5] Eldridge *v.* Knott, Cowp. 214.

sooner brought, would be an answer to the presumption which would otherwise arise from the length of time; but the mere fact of the defendant having been in embarrassed circumstances without more, is not sufficient to excuse the delay [1]. The fact of interest having been paid, would be sufficiently proved by a receipt for it in the hand-writing of the creditor himself endorsed on the bond, before the time when the presumption was likely to arise, because then he had no interest in making such endorsement [2]; but if made after that time, it would be no evidence [3].

Having thus stated the general rules applicable to every species of evidence, as well written as parol, I shall now proceed to give them a distinct and separate consideration.

[1] Williaume *v.* Gorges, 1 Campb. 217.

[2] Searle *v.* Lord Barrington, 2 Stra. 826. 2 Lord Raym. 1370, S. C.

[3] Turner *v.* Crisp, 2 Stra. 827. Vide Washington *v.* Brymer, Appendix.

CHAP. II.

[26]

OF WRITTEN EVIDENCE.

WRITTEN evidence has been divided by Lord Chief Baron Gilbert into two classes; the one that which is *public*, the other *private*; and this first has been again subdivided into matters of record, and others of an inferior nature. I shall follow these divisions, and treat of each in its order.

SECTION I.

Of Records.

Ch. II. s. 1. *Judgments and Acts of Parliament.*

The memorials of the legislature, such as acts of parliament (*a*), and judgments of the king's superior

(*a*) Of acts of parliament the law makes a distinction between those which are *public*, as concerning the realm, all spiritual persons, all offices, and the like, and those which settle the private rights of individuals or particular places, and which are therefore called *private*. The former are not, correctly speaking, the subject of proof in any court of justice, for, being the law of the land, they are supposed to be known to every man: and therefore the printed Statute Book is, on all occasions, referred to, not as evi-

[27]

dence to prove that of which every man is presumed to be already conusant; but for the purpose of refreshing the memories of those who are to decide upon them. But private acts of parliament not concerning the public, are not considered as *laws*, but *facts*, and therefore must be proved like other records which concern private rights, by copies from the parliament rolls; for the printed statutes are, in this respect, only private copies, and consequently no evidence of the fact. In one case Lord C. B. *Parker* permitted the printed statute touching the College of Physicians, which is a private act, to be read in evidence from the Statute Book printed by the king's printer; but the general, indeed universal practice, is to prove examined copies. *Vide* Gilb. Law. Ev. 10, 13. To prevent this inconvenience, the legislature frequently declares, that acts in their nature private, shall be deemed public, which enables judges to consider them as laws, and thereby prevents

Ch. II. s. 1. *Judgments and Acts of Parliament.*

rior courts of justice are denominated *records*, and are so respected by the law, that no evidence whatever can be received in contradiction of them (*b*); but being the precedents of the law to which every man has a right to have recourse, they are not permitted to be removed from place to place to serve a private purpose; and are therefore proved by copies of them, which in the absence of the original, is the next best evidence.

Gilb. Law Ev. 7 Coke Lit. 182, a.

[28]

vents the necessity of evidence to prove, or special pleading to introduce them to the notice of a court of justice; and with the like view the statute 49 Geo. 3, c. 90, s. 9, enacts, that copies of the statutes of Great Britain and Ireland prior to the union of those countries, printed by the printer duly authorized, shall be received as conclusive evidence of the several statutes in either kingdom. For particular instances of what laws are considered as public, and what otherwise, vide Bul. N. P. 225, &c.

(*b*) By the practice of the courts at Westminster, all writs issued in vacation, are tested as of a day in the preceding term; and when an issue is made up in a proceeding by bill, the plaintiff is stated to have brought his bill into court on the first day of the term, or of the term generally, which signifies the same thing. It was, for some time, doubted whether the parties were not estopped by this fiction, from showing the exact day when the suit was commenced; but it was afterwards determined, that where it became necessary for the purposes of justice, to show the day when the writ in fact issued, either party might do so; and therefore, wherever the defendant pleads a tender before the exhibiting of the bill, or that he did not promise within six years next before that time, the plaintiff may set forth in his replication the day on which the writ was sued out, and state that the tender was not made before that day, or that the defendant promised within six years before it; and in like manner, if the plaintiff's cause of action accrue within the term, the day may be proved, by the production of the writ by the plaintiff, or a copy of the *præcipe*, after notice to produce it, by the defendant. Vide *Johnson* v. *Smith*, 2 Burr. 950; *Morris* v. *Pugh*, 3 Burr. 1241. But, in general, the filing of the bill is considered as the commencement of the suit, and therefore the plaintiff may give evidence of any cause of action arising before it, though after the writ sued out, *Foster* v. *Bonner*, Cowp. 454; and this in bailable as well as other actions. *Best* v. *Wilding*, 7 T. Rep. 4.

An officer, whose business it is to keep the records, may be examined as to the condition of them, but not as to the matter of the record. *Leighton* v. *Leighton*, 1 Stra. 270. And if words have been struck out, which render a record erroneous, witnesses may be examined to show that such words were improperly struck out; but not to falsify the record, by showing that an alteration, whereby the record was made correct, was improperly made. *Dickson* v. *Fisher*, 1 Black. 664; 4 Burr. 2267, S. C.

These

Ch. II. s. 1. *Exemplifications and Sworn Copies.*

Gib. Law Ev. 14; 3 Inst. 73.

These copies are of three kinds; 1st, Such as are exemplified under the great or broad seal, which by virtue of that seal, become themselves records (*c*), and can only be of proceedings in the court of Chancery, or those of the other courts returned there by *certiorari*.

2dly, An exemplification under the seal of the court, in which the proceedings are:

[29] Rolfe v. Dort, 2 Taunt. 52.

Or, lastly, a copy examined with the original by a witness, and proved by him on oath. As to the mode of examination a distinction has been taken between an examination by the witness, assisted by the officer having the custody of the original record, and an examination between two strangers. In the former case it is sufficient for the witness to prove that the paper offered in evidence agrees with what the officer read as the contents of the record; but in the other case, the two persons examining should change papers and read them alternately, so that the witness may be certain that the original was truly read to him, which the court will not presume to be the case, when the person reading was a mere stranger, and not in the performance of any duty cast upon him by his office.

Tidd's Pract. 690, 3d edit.

An exemplification under the great seal is the only evidence where the record itself is put in issue, by a plea of a *nul tiel record* in another court equal or inferior to that which gave the judgment; but if the record be put in issue in an action depending in a court superior to that in which it is, the superior

(*c*) *Letters patent* being under the great seal are also matters of record, and are, therefore, read without further proof; and by stat. 3 & 4 Edw. 6, c. 4, and 13 Eliz. c. 6, patentees, and all claiming under them, may make title, by showing the exemplification or constat of the roll. These statutes have been held to extend to all the king's patents which concern lands, privilege, or other thing granted to a subject, corporation, or any other. *Page's* case, 5 Co. Rep. 53.

court

court may itself issue a *certiorari* to the inferior court to certify it; and if a record of the same court be denied, the record itself is inspected by the judges. When the record, being merely inducement to the action, forms a part only of the evidence to the jury, the examined copy is considered as sufficient evidence of it; but no copy of that so examined, however authenticated, is admitted; for if the party has the first copy, and by oath, or otherwise, proves that to be a true copy, then the second is useless, and if only that is produced, then the first not being there to be sworn to, it does not appear that it is a true copy. In some cases, however, when it has been clearly shown that a record once existed, which has been since destroyed, much inferior evidence of its contents has been admitted, especially in cases where the record is only inducement to an action. Thus, in ejectment for a rectory, to which a recusant had presented, the record of his conviction being destroyed by fire, it was permitted to be proved by the estreats in the Exchequer: but in these cases, the most strong and satisfactory evidence is required; the collateral evidence should prove the same facts, as the regular evidence would if in existence; and, therefore, where the estreat and presentment were of the same assizes, it was held to be no proof of a conviction, for the stats. 23 Eliz. c. 1, and 29 Eliz. c. 6, direct proclamation to be made at the assizes where indicted, and for the person to render himself before the next assizes, and therefore he could not be convicted at the same assizes. This species of evidence can be applicable to those cases only, where very ancient records are lost; for if a recent roll be lost, and its contents can be ascertained, the court will permit a fresh one to be engrossed.

Gilb. Law Ev. 9.

Gilb. Law Ev. 22.

[30]

Knight *v.* Dauler, Hard. 323.

Douglas *v.* Yallop, 2 Burr. 722.

Ch. II. s. 1.

Exemplifications and Sworn Copies.

Copies of judgments must, in general, be stamped[1]; but it has been held, that no stamp is necessary on a copy of the minutes of a judgment in the House of Lords.

[1] Jones v. Randall, Cowp. 17.

The exemplifications or copies under seal, are considered as of higher authority than any sworn copy, for the courts of justice which put their seals to them, are supposed to be more capable of examining them, and more critical and exact in their examination, than any other person is, or can be; and, therefore, no other proof is necessary of such copies, than the production of them[2], for the courts under whose seals they are authenticated making a part of the law and constitution of the country, their seals are supposed to be already known to every person, like every other part of the law; and, for the same reason, the seal of a court constituted by act of parliament, as the Great Sessions in Wales, or a county palatine, is, of itself, sufficient proof of the record it authenticates[3].

[2] Gilb. Law Ev. 14. 19.

[3] Olive v. Gwin, 2 Sid. 145. Hard, 118. S. C.

Proof by Office Copies.

Something similar to exemplifications under the seal of a court, are what are denominated *office copies* of its proceedings, granted out and authenticated by an officer appointed by the law for that purpose. There are, however, but few instances in which an officer is so entrusted, and though in cases where he is, the law, on account of the confidence reposed in him, receives his copy without further evidence; yet, where that trust does not form part of the duty of his office, his certificate is no more than that of any other private person, and gives the copy certified no credit whatever.

Thus, though in every instance, where any copy of a proceeding is granted out by an officer of the court, as copies of proceedings in Chancery, in the Crown Office, &c. it is commonly called an *office copy*, and

Ch. II. s. 1. *Office Copies.*

and such copy is, for the sake of convenience, permitted to be read in any part of the same cause; it is not legally evidence before another court. The *office copies* of the bill answer, and depositions are read in the Court of Chancery without further proof; but at common law they are no evidence, unless examined and proved, because the officer is not entrusted by the law to authenticate such copy. The chirograph of a fine, or the endorsement on a deed by the proper officer, of its having been enrolled, are good evidence of the fine having passed, or the deed having been enrolled, without proving them examined; for the officer is appointed by law to give out the copies in the one instance, and the certificate in the other. So an endorsement of a deed having been enrolled by the auditor of the Dutchy of Lancaster, pursuant to a clause in the deed is good evidence of the enrolment. But an endorsement on the fine, by the same officer who made out the chirograph, that proclamations had been made, is no evidence of such proclamations: because, though the chirographer is authorized to make copies of the agreement filed of record for the parties, yet the statute which gives that authority, does not appoint him to copy the proclamations. To prove these, therefore, the copy must be examined with the record, and proved as in other cases. So a copy of a judgment, made by the clerk of the Treasury, must, nevertheless, be examined with the original record; and *if a deed be lost* (*d*), and a copy made out from the enrolment, and offered to a jury as the next best evidence the case will admit of, it should be examined with the enrolment, and proved by a witness: for though the stat. 26 Hen. 8, c. 16, authorizes the clerk to certify the enrolment, he is not entrusted to give out copies. The clerk of the rules is appointed to

[32]

Gilb. Law Ev. 24 to 26. Bul. N. P. 229.

Kinnersly v. Orpe, Dougl. 56.

Gilb. Law Ev. Bul. N. P. ut supra.

[33]

(*d*) *Vide post*, [112].

Ch. II. s. 1.

The whole must be copied.

make out the rules of the court, and authenticate them, and therefore a rule produced under his hand, is sufficient without proving it examined with the entry in the books[1]: and in like manner a copy of depositions sworn at a judge's chambers, delivered out by the judge's clerk, and attested by his signature, is sufficient without examination with the original deposition[2]. But where the examination of a soldier had been taken by two magistrates, touching his settlement, it was held that the signatures of the magistrates should be proved, notwithstanding the mutiny act makes such examination evidence of his settlement[3].

[1] Selby *v.* Harris, 1 Lord Raym. 745.

[2] Duncan *v.* Scott, 1 Campb. 101.

[3] Rex *v.* Bolton, with Harrowgate, 1 East, 13. Vide 3 Barn. & Ald. 121.

It is, in general, a rule, that before exemplifications, or other copies of records, are made, the record should be drawn up in form, for though by the practice of the courts at Westminster, the party may take out an execution immediately the judgment paper is signed by the officer of the court; yet it is not a perfect and permanent record till brought into court, and there filed as a memorandum or roll: till that is done it is transferrable to any place, and so does not come within the reason of the law, which permits a copy to be given in evidence[4]. But when, by the practice of the court, the minutes are considered as the judgment itself, and it is not usual to make any further entry, copies of such minutes may be given in evidence, as is always done in the case of minutes of the House of Lords of the judgment given by them on an appeal from the Court of Chancery[5].

[4] Gilb. Law Ev. 22.

[34]

[5] Jones *v.* Randall, Cowp. 17.

The record being so completed, the whole, and not a part only, must be exemplified or copied, in order that the court may be in possession of the full effect of it; for a partial extract may bear a very different import from the whole taken together[6]: but in cases of public concern, such as the minister's return to the

[6] 3 Inst. 173. Gilb. Law Ev. 17. 23.

Against whom a record in a civil suit is evidence, and its effect.

the commission in Henry the Eighth's time to inquire into the value of livings, so much as relates to the particular matter in dispute is sufficient, without proving the commission[1].

Having thus shown how a record is to be proved, the next object of inquiry will be, against whom it is evidence, and to what extent. It is an established rule of law, that a fact which has once been directly decided shall not be again disputed between the same parties; and therefore a judgment of the same court, or one of concurrent jurisdiction, whether upon verdict, demurrer, or by default, if *directly* upon the point, may be pleaded in bar in cases where special pleading is required, and in other cases given in evidence on the general issue (*e*), as *conclusive* between the parties upon the same matter coming either directly or incidentally in question[2].

[35]

Thus a judgment for the recovery of a debt is conclusive evidence of its existence against the party to such judgment and his representatives; and a man who, on being sued, gives a *cognovit* for the debt[3], or pays money into court[4], or suffers judgment by default, will not afterwards be permitted to recover back the money, though he can show, by the clearest evidence, that he has paid it before; and even if no judgment be signed, or formal act done

[1] Per Hardw. C. in Sir Hugh Smithson's case, vide Bul. N. P. 228.

[2] Vide 11 St. Tr. 261.

[3] Marriot *v.* Hampton, 7 T. Rep. 269.

[4] Vaughan *v.* Barnes, 2 Bos. & Pull. 392.

(*e*) In *Voocht* v. *Wynch*, 2 Barn. & Ald. 662, the court held that to make a former verdict conclusive in any case, it should be pleaded by way of estoppel, and that if not so pleaded it could only be left to the jury as evidence, but not as conclusive of the right. To this decision, however, may be opposed the cases of *Hitchen* v. *Campbell*, 2 Black. 827; 3 Wils. 304, S. C.; *Budd* v. *Randall*, 3 Burr. 1353; and *Scott* v. *Shearman*, 2 Black. 977, which are stated in the following pages. It is also to be observed that, according to the cases of *Sir Fred. Evelyn* v. *Haynes*, 3 East, 36, and *Miles* v. *Rose*, 5 Taunt. 705, the judgment in the above case would not have been conclusive if pleaded; being only a verdict on the general issue in an action on the case, when the question of right was never pointedly put in issue. In most of the cases cited, *post*, p. [75], the judgments which were held to be conclusive were not pleaded.

Ch. II. s. 1. *Judgments in Civil Actions.*

in consequence, but a party on being sued [1], or a tenant when distrained on [2], pays the money demanded of him, protesting at the same time that it is not due; still the law will not permit him to recover back money so paid in the course of a legal proceeding. It was indeed held in one case [3], that where money had been recovered against conscience in a court *not of record*, an action as for money had and received might be brought to recover it back; but the authority of this case has been since much questioned [4].

[1] Brown *v.* M'Kinnally, 1 Esp. Cas. 279.

[2] Knibbs *v.* Hall, 1 Esp. Cas. 84.

[3] Moses *v.* Macfarlan, 2 Burr. 1009.

[4] Vide 2 H. Black. 414. 7 T. Rep. 269.

In like manner, as the judgment concludes the defendant from disputing the debt, it precludes the plaintiff from recovering a larger sum of money than has been awarded him; and therefore if a plaintiff claiming a debt composed of different items, attempt to prove the whole, and fail as to part of it, he will not be permitted at a future time, when possessed of better evidence, to recover that part; but the defendant may plead the judgment in bar, and it will be *conclusive* evidence for him. But if the plaintiff never attempted to give this part of his demand in evidence he will not be estopped by the record, from proving that fact, and recovering the remainder of his debt; though the declaration in the first action contained counts adapted to that part of his demand [5].

[36]

[5] Seddon *v* Tutop, 6 T Rep. 607.

When a judgment as to personal property is given *for the defendant* on the merits of the case, it precludes the plaintiff from making a fresh demand, either in the same form of action, or in any other of equal degree; and therefore where *A.* brought an action of *trover* to recover personal property, and a verdict was given against him on the merits, this verdict was held to be *conclusive* evidence in an action of *assumpsit* by him for money had and received, to recover the money produced by the goods [6]; for though a different form of action it was still one of the same

[6] Hitchen *v.* Campbell, 2 Black. 827.

same degree, it was the same question of property, and the judgment was directly on the point. So where to an action of *trespass* the defendant pleads to the merits, and on *demurrer* to the plea, judgment is given for him; this operates as a bar to an action of *trover* for the same taking, and may be pleaded to such action[1], or, perhaps, according to the modern rules of pleading in that action, given in evidence on the general issue. But had the first action failed through any error or misconception of the form of action, or misprision in the pleadings, then the judgment would not have barred the subsequent action[2]; but the plaintiff might, in case it had been specially pleaded, have traversed the averment of the cause of action being the same.

[1] Ferrar's case, 6 Co. 7. Ferrars *v.* Arden, [37] Cro. Eliz. 668, S. C.

[2] Lechmere *v.* Toplady, 2 Vent. 169.

The cases above referred to arose on questions respecting *personal* property, but the same rule holds in actions which concern *real* estates. If a dispute arise respecting lands, and any fact come *directly* in issue, the finding of a jury on that fact is received as evidence of it in any future dispute between the same parties or others claiming under them, though in respect of other lands[3]; and if in an action of trespass the right to an easement in land, or to any part of the land itself, be put on the record, traversed, and found against the party pleading it, such finding is *conclusive* against the right, and if the same plea be pleaded to another action, may be replied by way of estoppel[4]. But though a judgment in one action is *conclusive* evidence in all others of the *same degree*, it does not operate as a bar to any other of a *higher nature* than that in which it was given[5]; nor will it in any case be *conclusive*, unless the point be directly raised; and therefore the judgments in mere *possessory actions*, where the defendant pleads the general issue, and the question of *right* is never pointedly in issue[6], as in actions for disturbance, ejectment,

[3] Lewis *v.* Clarges, G. L. Ev. 29. Bul. N.P. 232, S.C. called Sherwin *v.* Clarges.

[4] Outram *v.* Morewood, 3 East, 346.

[5] Vide Ferrar's case, 6 Co. 7.

[6] Sir Fred. Evelyn *v.* Haynes, cited 3 East, 36. Miles *v.* Rose, 5 Taunt. 705.

Ch. II. s. 1. *Judgments in Civil Actions.*

ejectment, &c. though a degree of evidence, as to the right, are never so conclusive as to bar other actions or preclude another defence of the same nature.

[38]

It must always be remembered, that it is against the party to an action, or one claiming under him only, that a judgment is evidence. Against third persons, a verdict or judgment in a civil case, is no evidence whatever; for the first principles of natural justice require that a man should be heard before his cause is decided, and if he were to be bound, or in the least degree prejudiced by a verdict where he had no opportunity of cross-examining the witnesses, it would, in effect, be overturning this most salutary rule of jurisprudence.

Gilb. Law Ev. 34.

In general, too, the benefit of the rule is mutual; and therefore, if in a suit between *A.* and *B.* a verdict pass for *A.*, *C.* who was no party to the cause, is not permitted to give this in evidence against *B.* in any future action there may be between them; for it would be unjust to suffer that to be given in evidence against a man, from which he could not have derived any benefit; but this general rule is liable to exception, in cases where a man is privy in estate with the person who recovers the verdict, for in such case the verdict will be evidence for him, though he would not have been bound by it, had it been the other way.

[39]

Thus, if there are several remainders in the same deed, and he who is in possession recovers a verdict in an action brought against him for the land, another remainder-man may give this verdict in evidence in another action against him, at the suit of the same plaintiff; for had the verdict been against the termor, the remainder-man would have been dispossessed. So had there been a verdict for the tenant for life, in ejectment, where no aid can be prayed, it seems that the

Vide Pike v. Crouch, 1 Lord Raym. 730, and Rushworth v. Countess of Pembroke, Hard. 472.

the reversioner might, nevertheless, give this verdict in evidence, because he would have been prejudiced by such verdict, for his reversion would have been turned thereby into a naked right. Of this, however, Lord Chief Baron *Gilbert* (page 35) makes a *quære*, and the point seems never to have been decided (*f*).

But when it is said that a verdict is not evidence for or against one who is not party to a cause, it is not to be understood that a man who merely uses the name of another for his own benefit, is not bound by the verdict which is given against him. Courts of justice in these cases, will take notice who is the real plaintiff or defendant in a cause; and therefore, if a man bring an ejectment in the name of another, as his lessee, he being in fact the real plaintiff in the cause, the verdict is evidence for or against him, in an ejectment brought in the name of another plaintiff, on his demise; and in like manner a recovery, in an action of trespass, against one who, justified as servant of *A.* is admissible, though not

[40]

Gilb. Law Ev. 35.

Kinnersley *v.* Orpe, Dougl. 517.

(*f*) In Com. Dig. Evid. (A.) 5, it is said, "A verdict for or against the plaintiff, with proof of the evidence by him given, shall be evidence in an action, *by another*, against him for the same thing; as in an action by a common carrier for goods delivered by mistake, a verdict for or against the plaintiff, with the proof by him given, shall be evidence in an action by the owner against the carrier for the same goods." Per *Holt*, at Guildhall, 14 W. 3. Mr. J. *Buller*, (N. P. p. 243), mentions the same case, but it seems there that the verdict was not given in evidence, *as the verdict of a jury determining any point*, but as evidence of a confession on record by the carrier, that he had the goods of the person who afterwards so brought the action, and to lay a ground for proving what a deceased witness swore; though it should seem that the last part of the evidence would be objectionable, if as we have heretofore seen, and shall have occasion to state hereafter, the objection to a proceeding *inter alios* applies to depositions as well as to records. The case of *Whately* v. *Menhiem*, 2 Esp. N. P. Cas. 608, seems also to have been decided without attending to this rule, that no one can use a verdict as evidence for him who could not have been bound by it, had it been the other way, for the plaintiff in that case would clearly not have been in the least affected by the verdict had the issue been found for the defendant, unless he had been one of the creditors on whose petition the issue was granted, which appears not to have been the case.

conclusive

Ch. II. s. 1. *Judgments in Civil Actions.*

conclusive evidence of the right, in an action against another servant of *A.* for a similar trespass.

There is another exception to the rule, that a judgment is only evidence between the parties, or those claiming under them, and that is, wherever the matter in dispute is a question of public right; in this case all persons standing in the same situation as the parties, are affected by it, and it is evidence to support or defeat the right claimed; thus, a verdict finding a customary mode of tithing [1], the right of a city to toll [2], the right of election of a churchwarden [3], or schoolmaster [4], a customary right of common, the liability of a parish to repair a particular road [5], a public right of way [6], or the like, is evidence for or against the custom or right, though neither of the litigating parties are named in, or claim under those who are parties to the record.

[1] Gilb. Law Ev. 36.
[2] City of London *v.* Clarke, Carth. 181.
[3] Berry *v.* Banner, Peake's N. P. 156.
[4] Ld. Brounker *v.* Sir Rd. Atkyn, Skin. 15.

[41]

[5] Rex *v.* St. Pancras, Peake's Cas. 219.
[6] Reed *v.* Jackson, 1 East, 355.

The effect of verdicts in *criminal cases* on the *civil* rights of the parties does not appear, till lately, to have been very clearly settled. Hardly any thing is to be found in the more early books on the subject but loose *dicta*, from which very little information can be collected. It is said in one book, of very little authority, that "the verdict in a *civil cause* may be given in evidence in a *criminal cause*, but not *vice versâ*, and that the court said they would hardly grant a new trial where a verdict might become evidence in a criminal cause [7]." From this note, loose as it is, it may be collected that the question did not arise in the case then before the court; but that they were only apprehensive that the verdict in that cause might be made the foundation of a criminal proceeding. This, I presume, is all that is meant by its being evidence; for it could never be thought for a moment that it would be so of the criminal fact; and it is plain, the court did not proceed on the ground of a former verdict in a *criminal* case having been offered in evidence in a *civil* suit.

[7] Richardson *v.* Williams, 12 Mod. 319.

Lord

Ch. II. s. 1. *Judgments in Criminal Cases.*

Lord Chief Baron *Gilbert*, indeed, makes a *quære*, whether such verdict can be given in evidence, because the party could not attaint the jury as he could in a civil action; but there are many cases where verdicts may be given in evidence against a party who could not have an attaint, such are all those which establish customs and other public rights, where, as was just now observed, the verdict is always received in evidence against persons who, being neither parties nor privies to the cause, could not avoid it by that remedy; that, therefore, does not seem to be the true criterion by which the question is to be decided.

Gilb. Law Ev. 32.

[42]

One other case occurs, which also contains little more than a *dictum*, though certainly one of great authority on the subject: It was an issue directed to try whether certain notes of hand were forged or genuine; and on the trial the plaintiff having read the deposition of a deceased witness to prove the hand-writing, the defendant offered the record of a conviction of the plaintiff for forging *another* similar note to which the same witness had also sworn. This evidence was objected to by Serjeant *Parker*, who contended that, "it was a rule of evidence that no record of a criminal action could be given in evidence in a civil suit, *because such conviction might have been upon the evidence of a party interested in the civil action.*" Lord *Hardwicke* is reported to have said, that the general rule was as Mr. Serjeant *Parker* had mentioned, and that it had been so strictly kept, that, in a case which he mentioned, and which I shall presently state, the court, on a question of legitimacy, refused to admit in evidence a sentence of excommunication in the spiritual court, for fornication between the father and mother of the party whose legitimacy was impeached; and therefore he rejected this conviction.

Gibson *v.* M'Carty, Cas. temp. Hardw. 311.

[43]

This

Ch. II. s. 1. *Judgments in Criminal Cases.*

This case of *Gibson* v. *M'Carty* is not very accurately reported, but it is clear that the evidence which was offered was properly rejected; for the conviction was on another transaction, which ought not to have prejudiced the claim before the court. In the case cited, too, the judgment of the ecclesiastical court was not directly upon the point; the father and mother of the party might have committed fornication, and yet have been married previous to his birth; and it is clearly settled, that a judgment is not evidence of any fact, which is only to be collected by inference from it. That this was one ground at least of the determination, appears from a more full statement of the same case by the name of *Hillyard* v. *Grantham*; though it must be confessed that, by the manner in which it is there cited by Lord *Hardwicke*, that learned magistrate seems to have adopted the general principle, that a verdict in a criminal case cannot be evidence in a civil suit. His lordship stated the case to be a trial at bar on an issue directed out of the Court of Chancery, and said that he was counsel in the cause. That, during the life of the father and mother, there had been a proceeding against both of them, in the Consistory court of Lincoln, for living together in fornication, and sentence given against them: on the trial, that sentence was offered in evidence to prove that they were not married; and the whole court were of opinion that it could not be given in evidence; because, first, it was a criminal matter, and could not be given in evidence in a civil cause; next, that it was *res inter alios acta*, and could not affect the issue (*g*). But they held, that if it had

Vide post, [74].

Hillyard *v.* Grantham, 2 Ves. 246.

[44]

(*g*) As to this point see the several cases in s. 2, page [72], *et seq.* which clearly show, that where a marriage comes directly in issue in the ecclesiastical court, it is evidence against the issue; and what is subsequently said by Lord *H.* himself, in this very case, shows that this would have been no objection.

been

been a sentence on the point of the marriage, on a question of the lawfulness of the marriage, it, being the sentence of a court having proper jurisdiction, might have been given in evidence.

There is also another *nisi prius* decision of Lord *Holt*, which should be noticed in this place. A man being prosecuted for a fraud in obtaining a note of hand, the person who had been defrauded was called as a witness, and that learned judge rejected his testimony; assigning, as a reason, that *though the verdict could not be given in evidence in an action on the note*, he was sure to hear of it to influence the jury. This *dictum* of Lord *Holt* is open to two constructions; his lordship might either mean to say, that in no case could a judgment in such a prosecution be given in evidence in a civil action; or only, that a verdict *founded on such evidence as was then offered*, would not be admissible; and with this latter construction agrees Lord Chief Baron *Gilbert*, who says, that where the conviction is in fact founded solely on the evidence of the party interested in the civil suit, the record cannot be evidence in it, because a party shall not be permitted to give that evidence by indirect means which he would not be heard to speak as a witness; and though the case cited by *Gilbert* is silent as to this point, and only proves that the description of a party in an indictment, or the evidence then given by a witness, since deceased, is not evidence on an appeal, yet from what was said by Serjeant *Parker* in the case of *Gibson* v. *M'Carty*, it is plain that some opinion was entertained in Westminster Hall at the time *Gilbert* wrote as to this distinction. If we suppose that, in that case, the party interested had been in fact examined as a witness on the prosecution, it explains the whole; and shows, that on this ground also the evidence might have been rejected, without

Rex v. Whiting, Salk. 283.

[45]

Gilb. Law Ev. 30, cites 1 Sid. 325.

Ch. II. s. 1. *Judgments in Criminal Cases.*

without establishing as a general proposition, that in no case could such a conviction be evidence. That a verdict cannot be used by the party on whose testimony it was obtained, as evidence for him of the fact found by it, is now clearly settled by several modern cases. In one [1] the party attempted to avail himself of the conviction by a supplemental bill, but failed of success; and in another [2], the court held the party injured to be a competent witness on the indictment, on the express ground, that the conviction would be no evidence in support of his civil rights.

[46]

[1] Bartlet *v.* Pickersgil, post, [146], note.

[2] Rex *v.* Boston, 4 East, 373.

Gilb. Law Ev. 31.

But it is said also by *Gilbert*, that if the party was not examined as a witness on the prosecution, or his evidence formed a part only of that given to the jury, the verdict in the criminal prosecution may be evidence in the civil cause: with deference to so great an authority, I cannot help observing, that it seems rather contrary to the general principle of rejecting all evidence of an interested party to permit a verdict, where his testimony formed any part of the consideration of the jury, to be given in evidence; for it seems difficult to draw the line, and say how far they might be influenced by his testimony, or by that of any other witness. It is further to be observed, that no such distinction was made in the case of *Bartlet* v. *Pickersgill*, the conviction in which case was founded on other evidence besides that of the plaintiff; and in several recent instances [3] it has been decided, that in no case where the party is examined, can the conviction be received as evidence for him of the fact found by it.

[3] Smith *v.* Rummins, 1 Campb. 11. Hatherway *v.* Brown, ib. 151. Burden *v.* Browning, 1 Taunt. 520.

Having thus mentioned the several cases which seem to show, that the evidence we are speaking of is in no case admissible, opposed as they are by the *dictum* of *Gilbert*, I shall, in addition to his authority, refer to the cases which daily occur of convictions on

on proceedings *in rem* in the Exchequer, and to what is said by Mr. Justice *Buller*[1], who lays it down as a general rule without any limitation, that, "a conviction in a court of *criminal* jurisdiction is *conclusive* evidence of the fact, if it afterwards come collaterally in controversy in a court of civil jurisdiction; as suppose, says he, the father convicted on an indictment for having two wives, this would be conclusive evidence in an ejectment where the validity of the second marriage was in dispute: but, he adds, the conviction would not be *conclusive*, so as to bar the party in a writ of dower or appeal, where the legality of the marriage came in question," though it would be *primâ facie* evidence on a plea of *ne unques accouple* before the bishop. The reason why the verdict would be conclusive in the ejectment, and not so before the bishop, I conceive to be, because in the one case the question of marriage would arise only collaterally and incidentally; but, in the other, it would come directly in question before a court to whose peculiar jurisdiction the trial of it belonged, and who could not be ousted of that jurisdiction by the finding in any other court. It must, however, be observed here, that no authority is cited by Mr. J. *Buller*, which proves that such a verdict would be conclusive evidence in the action of ejectment. The authority referred to (3 Mod. 164,) only shows that the court prohibited a suit in the spiritual court, *causa jactitationis maritagii* (*h*), brought by a man, who was convicted of bigamy,

[47]

[1] Bul. N. P. 245.

[48]

(*h*) This case is very obscurely stated in the report. When I first read it, I conceived that the verdict was offered to *disprove* the second marriage, by showing the illegality of it; and therefore concluded that the reporter was mistaken in stating it to be a cause of jactitation; and that in fact it must have been a suit for restitution of marital rights, or some other cause wherein the person suing claimed to be the husband; but, on further investigation, the verdict seems to have been introduced as evidence of a marriage *de facto* having taken place with the second wife.

against

Ch. II. s. 1. *Judgments in Criminal Cases.*

against his second wife, who pleaded the conviction, and applied for a prohibition; all that was said about the effect of such a conviction, on the plea of *ne unques accouple*, was in the argument of *Levinz* as counsel; but nothing appears to have been said, either at the bar or by the bench, as to its effect in an ejectment.

[49] But it is agreed, that had the party been acquitted, this would have been no evidence at all, in support of the second marriage, for it proves no fact; the defendant might have been acquitted, because he had reason to believe his first wife was dead, or for many other reasons, without supposing the second a legal marriage. In like manner, when there has been a judgment for the crown on an information *in rem* in the Exchequer, it has been held to be *conclusive* evidence to vest the property in the crown, and not to be controverted in any civil action; but a judgment of acquittal does not seem to have so strong an operation in favour of the party (*i*).

I shall

(*i*) *Scott* v. *Shearman*, 2 Black. 977. In an action of trespass for breaking the plaintiff's house and seizing his goods, which consisted of a quantity of geneva, the defendants, who were custom-house officers, proved a copy of a record of condemnation in the Exchequer, of the same geneva, and the court, after solemn argument, held this to be *conclusive* evidence in favour of the defendants, and not to be controverted. But a condemnation before the Commissioners of Excise does not, it has been said, conclude the party from disputing the property of it in an action for the seizure. *Henshaw* v. *Pleasance*, 2 Black. 1174; sed vide *Terry* v. *Huntingdon*, cited 1 Ld. Raym. 471; *Fullon* v. *Fotch*, Carth. 346; Cas. temp. Holt, 287; *Roberts* v. *Fortune*, 1 Hargr. Law Tracts, 468; and the general principles stated, *post*, [75]. In *Hart* v. *M'Namara*, C. P. Sittings after Easter Term 1817, (cited 4 Pri. Ex. Rep. 154) Ld. Ch. J. *Gibbs* held, that a condemnation of rum, as being adulterated, was evidence against the plaintiff, though such condemnation took place while the rum was in the hands of the defendant.

Cooke v. *Sholl*, 5 T. Rep. 255. Trover for several pipes of wine. The plaintiff being a wine-merchant, had purchased these pipes of one Hicks, which the defendant seized for want of a permit; and it appearing to be a malicious seizure, the jury gave a verdict for the plaintiff, with 150 *l.* damages. The defendant had prosecuted this seizure in the Court of Exchequer, and the record of *acquittal* was read in evidence. The defendant insisted under the

Ch. II. s. 1. *Verdicts.*

I shall conclude this part of the subject, by mentioning one more rule applicable to *verdicts*; and that is, that until final judgment is entered upon them,

[50]

Pitton *v.* Walter, 1 Stra. 161.

the circumstances (which it is unnecessary here to state) that the permit was out of time; and the judge was of that opinion; but, it being suggested, that a different determination had been made in the Court of Exchequer, he saved the point, with liberty to enter a verdict for the defendant if it should be adjudged with him.

The counsel was proceeding to argue the cause on the merits, when the court suggested a doubt upon another ground, and Lord *Kenyon* said, that he conceived the judgment of acquittal *in rem* was conclusive as to the question of the illegality of the seizure, and precluded all reasoning upon the construction of the permit; and however he might doubt whether the court had put a true construction upon the effect of the instrument, yet he could not help thinking that the judgment of acquittal was conclusive as to the illegality of the seizure which was the subject of the present action. That it seemed to be taken for granted, in Lord Mansfield's time, that a judgment of condemnation *in rem* was conclusive between the parties.

On this the rule was discharged: but, on a subsequent day, *Leycester* moved to open the rule again, stating that the ground on which they had before decided, was not clearly settled, and therefore he wished to have an opportunity of arguing it, for that there was a distinction as to the effect of a judgment of *acquittal* or *condemnation in rem* in the Exchequer; the former was not conclusive, though the latter was. Bul. N. P. 245. But independently of that question, he observed, that the case had been saved on a different point which was stated in the report, namely, the construction of the permit. Upon this the matter was ordered to stand over, and when it came on again, *Bower*, for the plaintiff, confined his observations to the effect of the judgment of acquittal in the Exchequer, and pressed the other side to consent to have the whole matter stated on the record: but this being objected to, *the Court*, though they expressed a wish that the parties would consent to have the question respecting the judgment of acquittal put upon the record, as it was a point of great importance, said, that at present they could not go out of the report, which confined the question to the only point made at the trial concerning the construction of the permit, on which no doubt could be entertained, but that the time was out when the seizure was made, and so there must be a verdict for the defendant. Rule absolute.

In the following case, however, a sentence of acquittal was considered as conclusive. In an action of assault and battery, the defendant justified as an officer in the army for disobeying orders, and gave in evidence a sentence of a council of war upon a petition against him by the plaintiff, and the petition being dismissed by the sentence, it was holden to be conclusive evidence for the defendant. *Lane* v. *Degberg*, H. 11 W. 3. Bul. N. P. 224. See also

Ch. II. s. 1. *Verdicts.*

them, they are no evidence of the fact having been legally decided, for if the *postea* only be produced, it does not appear that the judgment might not have been arrested, or a new trial granted; but the *postea* is good evidence to show that a trial was had between the same parties, so as to introduce an account of what a witness who is since dead, swore at that trial, for which purpose even a nonsuit is evidence. A verdict on an issue out of Chancery, however, is full proof of the fact it finds, though no judgment is entered upon it, for the decree is equal proof that the verdict was satisfactory, and stands in force.

Montgomerie v. Clark, B. N. P. 234.

Proof of Writs.

Writs issuing out of the courts at Westminster, are not considered as records till returned and filed in the court; whenever, therefore, a writ is the gist of the action, it must be filed, and a copy of it taken from the record; inasmuch as the party is to have the utmost evidence the thing is capable of, for it cannot become the gist of an action till it is returned; but when the writ is only inducement to the action, the fact of its having issued, may be proved by the production of the writ itself, because by possibility it might not be returned, in which case we have seen it is no record.

Gilb. Law Ev. 40; Bul. N. P. 234.

[51]

Returns of Writs.

When a writ is duly returned and filed, the return is so far evidence of the facts stated in it, as not to be disputed incidentally; and therefore if the sheriff return a rescue[1], or a summons on a writ of *scire facias*[2], the parties cannot dispute it on affidavits. And in a late case[3], where an action was brought against a plaintiff in a former suit for maliciously suing out an *alias fieri facias* after a sufficient levy under the first; the sheriff's return endorsed on the

[1] Rea *v.* Elkins, 4 Burr. 2129.
[2] Best *v.* Moravia.
[3] Gyfford *v.* Woodgate, 11 East, 297.

also Vin. Evid. (A. B.) 22, where Baron *Price* is said to have admitted an *acquittal* in the Exchequer as conclusive.

For the several instances in which the judgment of a court, whether of record or otherwise, shall be admitted as evidence, and to what extent, see *post*, [75].

two

two writs, (which were produced by the plaintiff as part of his case,) wherein the sheriff stated that he had forborne to sell under the first, and had sold under the second at the request of the now plaintiff, were held to be *primâ facie* evidence of the fact so returned. But the return will not be even *primâ facie* evidence of any fact not stated in it; and therefore a return to a *fieri facias*, stating that the sheriff had levied the money, does not prove that he paid it over to the judgment creditor, so as to charge him in an action for money had and received.

Ch. II. s. 1. *Returns of Writs.*

Cator *v.* Stokes, 1 M. & S. 599.

SECTION II.

Of Public Writings, not being Records.

Ch. II. s. 2.

PUBLIC matters, not of record, are next to be considered.—Some of these resembling records in being confined to one place for public satisfaction, the law suffers the like evidence to be given of them, as is usually given to a jury of records, viz. true copies examined with the original; and gives a degree of credit to others when produced, which it does not to a mere private instrument.

Of this nature are—

1st, JOURNALS OF THE HOUSES OF PARLIAMENT.

2dly, PROCEEDINGS IN THE COURT OF CHANCERY, by bill of complaint, which not being precedents of justice, but founded on the circumstances of each particular case, are not considered as furnishing a general rule of action, and for that reason are not denominated records.

[52]

3dly, Proceedings in the ECCLESIASTICAL or ADMIRALTY COURTS.

4thly, Those in FOREIGN COURTS.

Ch. II. s. 2. 5thly, INFERIOR JURISDICTIONS.

Journals of Parliament. 6thly, ACTS OF STATE and GENERAL HISTORY.

7thly, COMMISSIONS executed on public occasions.

8thly, PARISH REGISTERS.

9thly, All other things which *applying to several persons*, are in some degree of a PUBLIC NATURE, as the rolls of courts baron, terriers, and books of public companies and corporations.

Though I have, agreeable to the modern decisions, placed the *proceedings of the House of Commons* in this class, yet it seems formerly to have been matter of doubt, whether the Journals of that House were not entitled to the authority of records in the strict technical sense of that word. Sir *Edward Coke*, whose high opinion of the authority of Parliament is well known to every constitutional lawyer,

4 Inst. 23. has contended that they were so; and in support of his opinion has referred to the statute 6 Hen. 8, c. 16, which prohibits the absence of any of the members, without licence *entered of record* in the book of the clerk. Notwithstanding this high authority, it has been said, that as the House itself is not a court of record, none of its proceedings are so; and such is now the general opinion. According to the old notions of evidence, copies of nothing short of records could be received as evidence of the originals, and therefore it has by some been thought that in this case the books themselves should be produced; but the contrary is now clearly established, and copies from the books of either House examined with the originals, and proved by a witness, are equally received as evidence of the proceedings of the House; though in cases where either House of Parliament merely comes to resolutions as a foundation for other proceedings, these resolutions are no evidence

[53]

Vide Cowp. 17.

Jones v. Randal, Cowp. 17. Rex v. Ld. G. Gordon, Doug. 590.

evidence of the truth of the fact resolved; and therefore on the trial of *Oates*, the resolution of the two Houses [1], as to the existence of the popish plot, was properly held to be no evidence in a court of justice of the truth of that fact; and in two much later cases, in one [2] of which the House of Commons had resolved that a publication was a libel on the House, and in the other [3] that it was a libel on the Constitution, and where the Attorney-General was ordered to prosecute, the jury were nevertheless directed to consider the intention of the defendants, and in both cases acquitted the party who was so prosecuted.

[1] 4 St. Tr. 39.

[2] Rex *v.* Stockdale, K. B. Westm. after Mich. 30 G. 3.

[3] Rex *v.* Reeves, K. B. Guildhall, after East. T. 36 G. 3.

Bill in Chancery.

The BILL IN CHANCERY, when further proceedings had been taken on it, was formerly considered as evidence against the plaintiff, of any fact stated in it; but in modern times [4], courts, properly considering that most of the facts are the mere suggestion of counsel to extort an answer from the defendant, have held that it is no evidence for any other purpose, than merely to show, that such a bill was in fact filed, or to prove such facts as are the subject of reputation and hearsay evidence, as the plaintiff's pedigree and the like [5]; and even of this some doubts have been made [6].

[54]

[4] Snow *v.* Phillips, 1 Sid. 220; Bul. N.P. 235.

[5] Doe dem. Bowerman *v.* Sybourn, 7 T. Rep. 2. Taylor *v.* Cole, cited 7 T. R. 3, note (*a*)

[6] Ante, 13.

That the ANSWER of a defendant is evidence against the person swearing it, or those claiming under him [7], there can be no doubt, for if the admission of a man is received as proof of a fact against him, much more ought that confession which he makes on oath: but still it is considered as a confession only, though under a higher sanction, and therefore is admitted in no case where a confession would not be evidence; for which reason [8], the answer of an infant by his guardian [9], who is sworn to it, is not received as evidence against the

[7] Lady Dartmouth *v.* Roberts, 16 East, 334.

[8] Godb. 326.

[9] Eccleston *v.* Petty, alias Speke, Carth. 79.

Ch. II. s. 2. *Answers in Chancery.*

rights of the infant; and doubts have been entertained how far a *feme covert* should be prejudiced by her answer (*k*).

[55]

The consequence which follows from the answer being considered as an admission only, is, that the objection that it was *res inter alios acta*, does not apply as in the case of other legal proceedings. Therefore in the case just mentioned, of the answer of an infant by his guardian, the admission of the latter so made, though not evidence against the infant, may be evidence against himself[1]; and in an action against *B.* the answer of *A.* his partner, to a bill filed against him by *other creditors*, was admitted as evidence of the facts stated in it[2]; as was also the voluntary affidavit of one man, who was jointly interested with another in an action brought against them both[3].

[1] Beasley *v.* Magrath, 2 Schoale & Lefroy, 39. [2] Grant *v.* Jackson and another, Peake's N. P. 203.

[3] Vicary's case, Excheq. Gilb. Law Ev. 57. Brockman's case, Gilb. Law Ev. 51. 1710, per Gould.

We have before seen that a copy of the whole judgment, and not a partial extract of it, must be produced to the jury: the reason on which the rule was established, applies with equal force to proceedings in a court of equity, and indeed every other written instrument. The defendant is entitled, in a court of law, to have the whole of his answer read[4], and so far was this rule carried in one case[5], that where one answer had been put in by the defendant, and on exceptions taken to it, he put in a second answer, he was allowed on an information for perjury, to read the second answer in explanation of the

[4] Earl of Bath *v.* Battersea, 5 Mod. 10. [5] Rex *v.* Carr, 1 Sid. 418.

[56]

(*k*) *Wrottesley* v. *Bendish*, 3 P. Will. 235. In this case, where the question was, whether the wife should answer jointly with her husband or not, the Lord Chancellor said, "I do not now give any opinion whether the answer may be read against the wife, when discovert, or not, but as in all times heretofore, the wife as well as the husband, has been compelled to answer, I would not take upon myself to overthrow what has been the constant practice;" but his lordship said he would not compel her to answer any thing which might subject her to a forfeiture, though the husband submitted to answer.

general

general terms of the first. When, therefore, an answer is given in evidence, the party producing it makes the whole of it evidence for the defendant, of the facts positively stated in it; though not of those which are stated merely on hearsay, with the addition of the deponent's belief of their truth [1] (*l*). Still, though evidence

[1] Roe dem. Pellatt *v.* Ferrars, 2 Bos. & Pull. 542.

(*l*) In courts of equity a different rule prevails; the plaintiff may there select a particular admission, and when that is read, the defendant is obliged to prove the other facts stated in his answer by other evidence. Thus, where to a bill by creditors against an executor for an account, the executor answered that 1,100*l.* was deposited by the testator in his hands, and that afterwards on making up his accounts with the testator, he gave a bond for 1,000*l.* and the other 100*l.* was given him for his trouble and pains in the testator's business: though there was no other evidence that the 1,100*l.* was deposited but the executor's own oath, it was held, that when an answer was put in issue, what was confessed and admitted in it need not be proved by the plaintiff, but that it behoved the defendant to make out by proofs what was insisted on by way of avoidance. But this was held under this distinction: when the defendant admitted a fact, and insisted on a *distinct fact* by way of avoidance, *then he ought to prove the matter in his defence*; because it may be probable that he admitted it out of apprehension that it might be proved, and therefore such admittance ought not to profit him, so far as to pass for truth, whatsoever he says in avoidance: but if it had been *one fact*, as if the defendant had said the testator had given him 100*l.* it ought to be allowed, unless disproved; because nothing of the fact charged is admitted, and the plaintiff may disprove the whole fact as sworn, if he can do it. And it being urged, that here the probability was on the defendant's side, because the testator did not take a bond for this sum as for the residue, the Chancellor said there was some presumption in that, but not enough to carry so large a sum without better attestation. Anony. Hil. Vac. 1707, *per Cowper*, Chan. Gilb. Law Ev. 52. I have been particular in extracting the whole of this case, because perhaps no other better shows the distinction between the rules of evidence in the common law courts, and those possessing an equitable jurisdiction. In a court of law, it would have been said, as was urged in this case, that "if a man was so honest as to charge himself when he might roundly have denied it, *and no testimony could have appeared*, he ought to obtain credit when he swears in his own discharge." My habits of thinking and legal notions having been formed in courts of law, may perhaps have given me an unfair prejudice in favour of their rules; but I do confess that, to me they appear, in this particular at least, most consonant to reason and justice.

The above note has given rise to some observations from Mr. *Evans*, in his notes on *Pothier* (vol. 2, pp. 157, 8). He says, "the

Ch. II. s. 2. *Answers in Chancery.*

evidence of the facts so positively stated, it is not conclusively so, but the plaintiff may contradict it by other evidence; or if the jury, from the whole circumstances of the case, see reason to believe one part of it, and to disbelieve another; they may use the same discretion in this instance, as in every

"the distinction is not between courts of law and equity, but between *pleading* and *evidence*; and that if an answer in chancery was introduced incidentally, and merely by way of evidence in a court of equity, it ought to be treated precisely in the same way as in a court of law. On the other hand, it is very clear, that if in a court of law a plea confesses the matter in demand, but avoids it by other circumstances, the proof of the avoidance is incumbent on the defendant." Were there any analogy between the proceedings of a court of law and those of a court of equity, there would be great weight in the answer given to the objection; but the two courts proceed upon quite different principles, and each has adopted modes of procedure consistent with the principles upon which it acts. In a court of law the plaintiff states his case, and recovers upon the evidence which he himself is able to produce in support of it. The defendant is not called upon to make any confession by his plea; if he does so it is his own voluntary act, and therefore ought to bind him. In the case which has given rise to these observations, we must suppose that the plaintiffs, the creditors, had no evidence whatever. Had they sued the executor at law, the plea of *plene administravit* would have been a complete answer to their actions, and no money could have been recovered from the defendant. To obtain justice, the creditors file a bill in equity against the defendant, the very ground of their complaint being that they are remediless at law, though in justice the defendant ought to pay the money. The court of equity does not require the plaintiff to prove his case; the defendant has no means of compelling him to do so; nor can he, as in a court of law, put in such a plea as he may think most advantageous to himself. On the contrary, his conscience is pressed into the service of the plaintiff; the defendant is, in fact, *called as a witness for him*, and obliged, under the most solemn sanction, to state the case as it really is; the legal result of the several circumstances is not sufficient, the circumstances themselves must be particularly stated, and on this statement alone (for we are all along speaking of a case where the plaintiff has no witnesses) is it that the plaintiff can recover one shilling of his demand. Where then exists the analogy between an answer in chancery and a plea at common law, or how can this practice of a court of equity be called a rule of *pleading*? It is merely a case of *evidence*, and if the plaintiff choose to avail himself of the defendant's testimony, and make him a witness against himself, whether the answer is used in one court or in another, in justice and reason one would think it should have the same effect.

other,

other, of drawing such conclusion, as results from all the circumstances taken together [1]. Ch. II. s. 2. *Answers in Chancery.*

There is one instance, however, in which a part of an answer may be read without making the whole evidence; and that is where a person offered as a witness, has, in an answer, shown himself interested in the event of the cause [2]; the part of the answer, which is read for the purpose of rejecting his testimony, does not entitle him to have any other part read, and this for the best of all possible reasons, viz. that by doing so, the very purpose, for which it was produced, would be defeated, and he would be giving his testimony in the answer at the time that it appeared, that all evidence from him was inadmissible.

[1] Vide Bermon v. Woodbridge, Doug. 788.

[2] Sparin v. Drax, Mich. 27 C. 2. Bul. N. P. 238.

Similar to an answer is an affidavit of a man in the course of a cause [3]; but a voluntary affidavit, or one not made in the course of a judicial proceeding, as, for instance, one made by the vendor of an estate before a master in chancery, to satisfy the purchaser that the estate was free from incumbrances [4], cannot be proved without producing the original, and if meant to be relied on as a representation upon oath, must be proved also to be sworn; for if only the hand-writing be proved, it has no further effect than an admission in a note or letter; whereas the answer in chancery always being on oath, it is in all civil cases taken to have been sworn by the defendant, without further proof of identity than copies of the proceedings in the cause [5]; and even on an indictment for perjury, proof of the hand-writing of the master before whom it purports to be sworn, and of that of the defendant himself, has been held sufficient evidence of the administration of the oath [6].

Affidavit.

[3] Brockman's case, Gilb. Law Ev. 52.

[58]

[4] Smith v. Gordon, 3 Mod. 36.

[5] Gilb. Law Ev. 57. Hennell v. Lyon, 1 Barn. & Ald. 182.

[6] Rex v. Morris, 2 Burr. 1189.

The next kind of proceedings which generally come from the Court of Chancery, are the depositions of witnesses; and as the depositions taken in other

Depositions.

Ch. II. s. 2. *Depositions.*

other courts stand on the same foundation, I shall here consider them together. These are not received on the same principle as the answer, namely, as an admission of the party, but as the next best evidence in the room of some other, which his adversary has been deprived of; and therefore it is, that in no case where a witness is living and to be found (*m*), shall his deposition be read as evidence of the facts deposed to, or for any other purpose than to confront and contradict him [1]. But when it is proved that the witness is dead, or that he cannot be found after the most diligent search, or, as has been said, has fallen sick by the way [2] (*n*), the deposition of such witness shall be admitted in evidence; for though a private examination does not give that satisfaction to the mind, which a public one before a judge and jury does, it is nevertheless the representation of the witness under the sanction of an oath, and when he was equally liable to cross-examination by the party against whom his deposition is offered; for though certain questions are propounded to the witness in the form of interrogatories, yet it is the duty of the commissioners, before whom he is examined, to use all means to get at the truth; and they are not strictly tied down to the words of the interrogatories, but, as Lord *Coke* says [3], "to every thing else "which necessarily ariseth thereupon for the mani-

[59]

[1] Tilly's case, Salk. 286.

[2] Benson v. Olive, 2 Stra. 920; Godb. 326. Vide Luttrel v. Cory, 1 Mod. 283.

[3] Peacock's case, 9 Co. 70, b.

(*m*) In *Tilly's* case, the witne s after examination became interested, and was a party in the cause, and *Trevor*, C. J. at first thought that his deposition might be read: but *Tracy* and *Blencoe* being of a contrary opinion, *Tracy* went to the King's Bench to ask the opinion of that court, and C. J. *Holt* thinking that it was not evidence, *Trevor* agreed. Vide etiam *Baker* v. *Lord Fairfax*, 1 Stra. 101. In *Kinsman* v. *Crooke*, 2 Lord Raym. 1166, the witness had been examined in Chancery, and there referred to a written account. He afterwards became blind, and on a trial at law his deposition was read, and he called to give parol evidence in support of it.

(*n*) Though a good ground for postponing the trial, this would hardly now be considered as sufficient to make the deposition evidence.

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"festation of the whole truth of the matter in ques-
"tion." Even the evidence which a witness gave on a former trial between the same parties [1], has after his death been read in a civil action, a foundation being laid for it by the production of the *postea*. But this is not allowed in a criminal prosecution [2]. And in other cases the witness, who is to prove what was sworn, should give the precise words, and not what he supposes to be the effect of the evidence [3].

[60]

[1] Coker *v.* Farewell, 2 P. Will 563.

[2] Sir John Fenwicke's case, 4 St. Tr. 265, &c.

[3] Vide 4 T. Rep. 290.

It sometimes happens, that when witnesses are resident abroad, or about to leave the kingdom, or there is reason to fear their deaths, depositions are taken by the consent of the parties in a cause, or under the direction of a court of equity, on a bill filed for that purpose; and by stat. 13 Geo. 3, c. 63, s. 40, it is enacted, that in all cases of indictments or informations laid or exhibited in the Court of King's Bench for misdemeanors or offences committed in India, that court may, upon motion by the prosecutor or defendant, award a writ or writs of *mandamus* requiring the chief-justice and justices of the supreme court at *Fort-William*, or the judges of the mayor's court at *Madras*, *Bombay*, or *Bencoolen*, as the case may require, to hold a court for the examination of witnesses and receiving other proofs. And after directing the mode in which the court is to be holden, and the examinations taken, transmitted to England, and delivered into court, the statute goes on to enact, that such depositions, being duly taken and returned, shall be allowed and read; and shall be deemed as good and competent evidence as if the witness had been present and sworn and examined *viva voce* at any trial for such crimes or misdemeanors: and that all parties concerned shall be entitled to take copies of such depositions at their own costs and charges.

[61]

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Ch. II. s. 2.
As to what shall be said to be a cause of action arising in India.

The 44th section of the same act makes a similar provision in civil actions or suits in any court of law or equity in England, for which cause arises in India[1]; and though this clause does not, like the former, name the defendant, yet it has been held, that the writ may issue at his instance as well as at that of the plaintiff[2].

But in cases where a party offers this secondary degree of evidence, he ought to adduce some kind of proof to show that he is not capable of giving that which is ordinarily required[3]; and therefore when the witness is usually resident in England[4], or was here when the examination was taken, it must be proved that he is out of the jurisdiction of the court at the time his deposition is offered in evidence, for if he is within it, he himself must be called as a witness.

In criminal cases depositions are taken by virtue of the statutes 1 & 2 Philip & Mary, c. 13, and 2 & 3 Philip & Mary, c. 10. By the first of those statutes it is enacted, "That justices of the peace, or one of them, when a prisoner is brought before them for manslaughter or felony, before any bailment or mainprize, shall take the examination of the prisoner, and information of them that bring him, of the fact and circumstances thereof; and the same, or as much thereof as shall be material to prove the felony, shall put in writing, &c." The provisions of this statute, relative to cases where the party is admitted to bail, are by the other statute extended to those where he shall be committed to prison. On these statutes it has been holden, that if in a case of felony one magistrate take the deposition on oath of any person in the presence of the prisoner[5], whether the party wounded, or even an accomplice[6]; and the deponent die before the trial, the depositions may be read in evidence; but if the prisoner

[62]

[1] Vide Francisco *v.* Gilmore, 1 Bos. & Pul. 177.
[2] Grillard *v.* Hogue, 1 Brod. & Bing. 519.
[3] Vide Salk. 691.
[4] Fonsick *v.* Agar, 6 Esp. Ca. 92.
[5] Rex *v.* Radbourne, Leach Cr. Cas. 512.
[6] Rex *v.* Westbeer, ibid. 14.

prisoner be not present at the time of the examination, it cannot be read as a deposition taken on oath; though in cases where the party wounded declared himself apprehensive of death, or was in such imminent danger of it as must necessarily raise that apprehension, it may be read as his dying declaration [1], though not signed by the witness [2]. This act of parliament only extends to cases of felony, and therefore such examination cannot be read on an information for a libel [3].

In like manner, depositions taken before a *coroner* [4], have, in cases of the death, or absence beyond sea, of the witnesses, and where there is reason to believe that the prisoner sent them away [5], been used on a trial for murder (*o*). And where a pregnant woman died after examination, but before an order of filiation [6], such examination taken under the stat. 6 G. 2, c. 31, was held to be admissible evidence on an application to the quarter sessions to make an order of filiation on the putative father; and uncontradicted, to be conclusive. And a still stronger effect is by the stat. 33 Geo. 3, c. 9, given to an examination of a soldier under the mutiny act, which may be read at any future time, whether he be living or dead, as evidence of his settlement [7]. But in a case [8] where two justices had taken the examination of a common pauper relative to his settlement, but did not

[1] Rex v. Dingler, ibid. 638.
[2] Rex v. Hemming and Windham, 2 Leach. Cro. Cas. 996.
[3] Rex v. Paine, Salk. 281.
[4] Bromwich's case, 1 Lev. 180.
[5] Thatcher and Waller's case, Sir T. Jones, 53. Vide Harrison's case, St. Tr. 496.
[6] Rex v. Ravenstone, 5 T. Rep. 373.
[7] Rex v. Inhabitants of Warminster, 3 Barn. & Ald. 121.
[8] Rex v. Eriswell, 3 T. Rep. 707.

(*o*) In the case of the *King* v. *Eriswell*, it was argued by Mr. J. *Buller*, that the examination of the pauper was admissible; and in answer to the objection, that it was taken in the absence of the parties to be affected by it, he instanced the case of depositions taken before a *coroner*, which were always evidence, though the party was not present. I do not find that this point has been expressly decided in any reported case; Mr. J. *Buller* is reported to have said, that it was so settled in 1 Lev. 180, and Kel. 55; certainly nothing of the kind appears in those books: nevertheless, the practice has been to admit them after the death of the witness, without inquiry whether the party was present or not; and, notwithstanding the objection of counsel, they were received by Mr. B. *Hotham*, in the *King* v. *Purefoy*, Maidstone Sum. Ass. 1794.

remove

Ch. II. s. 2. *Depositions.*

remove him thereon, and he afterwards became insane, the judges of the Court of King's Bench were equally divided on the question, whether two other justices could remove his family on that examination.

Several other cases under similar circumstances, have since come before the court; in one[1], the pauper having been examined and removed by two justices, after notice of appeal, and before the trial of it, absconded, and could not be found; nevertheless the court held, that the respondents could not read his examination on the hearing of the appeal; and in two subsequent cases[2], the Court of King's Bench declared that the evidence offered in the case of the *King* v. *Eriswell* was not admissible, and rejected a similar examination even after the death of the pauper.

[1] Rex v. Nunehath Courtney, 1 East, 378.

[64]

[2] Rex v. Ferry Frystone, 2 East, 54. Rex v. Abergwilly, ibid. 52.

It was before observed, that a verdict could not in general be given in evidence against a man who was not a party to the cause, and consequently had no power to cross-examine the witnesses. This rule applies equally to the case of depositions, which are, as to a stranger to the cause, mere *ex parte* examinations; and therefore, unless in those particular cases where the legislature has made them evidence against all persons, or where they fall within the exception before noticed, in the case of judgments, as affording evidence of the *lex loci* (*p*), they are not admitted

Rushworth v. Countess of Pembroke, Hard. 472.

(*p*) In an action by the copyholder against the lord of a manor, for a false return to a *mandamus*, in which a custom was set forth in respect of copyholds granted for two lives, that the surviving life might renew, paying to the lord such fine as should be set by the homage to be equal to two years improved value, and not guilty pleaded, depositions made in an ancient suit, instituted against a former lord of the manor, by a person who claimed to be admitted to a copyhold for lives, upon a custom for any copyhold tenant for life or lives to change or fill up his lives, paying to the lord a reasonable fine to be set by the lord or his steward, (and which depositions were made by witnesses on

admitted to be read against him. We have before seen that depositions as to facts in dispute are no evidence of pedigree more than in other cases [1]; and therefore in such cases, as in others, a ground must be laid for their reception as proceedings in a cause, by connecting the person against whom they are offered in evidence, in interest with the party in the cause wherein they were taken, however remote the time of the examination. The other rule, namely, that a man who is not bound by proceedings shall not avail himself of them, applies with still greater force; for if this were allowed, he might use all those depositions which made for him, and those of a contrary description could not be used against him, because he had no power to cross-examine the witnesses.

[1] Ante, 17. Banbury Peerage Case, 2 Selw. Nis. Pri. 684.

I shall here mention only one case in which depositions are made evidence against all persons by particular act of parliament, and that is in the case of bankruptcy. By stat. 5 Geo. 2, c. 30, it is enacted, [65] "that commissions and depositions, or any part of such depositions, may, on petition to the Lord Chancellor, be entered on record; and in case of the death of the witnesses *proving the bankruptcy*, or in case the commission, depositions, proceedings, or other matters or things, shall be lost or mislaid, a true copy of such commission, &c. signed and attested, *as therein after is mentioned*, shall and may, *upon all occasions*, be given in evidence to prove such commission, and the bankruptcy of the per-

on behalf of such copyholder) were held to be admissible evidence for the lord, as depositions on behalf of a person standing *pari jure* with the plaintiff, although it was not proved that the persons making such depositions were copyholders, farther than as it appeared from the depositions themselves. The court added in this case, that considering these depositions merely as declarations, they were still not objectionable on account of their being made *post litem motam*, because the same custom was not in dispute in the former suit as in the present. *Freeman* v. *Phillips*, 4 M. & S. 486. *Sed vide ante*, 17.

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Ch. II. s. 2. *Depositions.*

son against whom such commission hath been or shall be awarded, or other matters or things.

If a commission issue, and a witness prove an act of bankruptcy on a *particular day* and die, his deposition, when enrolled, may be given in evidence to prove the act of bankruptcy, *and the time it was committed,* against any person whatever; and therefore, if a creditor of the bankrupt levy his goods under an execution after the day on which such act of bankruptcy is proved, the deposition is sufficient to overturn it.

Janson v. Wilson, Dougl. 244.

It is well observed by Mr. *Douglas,* in a note on the case of *Janson* v. *Wilson,* that there is a remarkable inaccuracy in this act of parliament. After prescribing the manner of entering the commission, &c. of record, it says, that true copies, signed as *thereinafter* mentioned, shall and may be given in evidence; but there is not, in the subsequent part of the clause, nor of the act, any provision for attesting and signing the entries so made. It is only enacted that, "the Lord Chancellor shall appoint a person who shall, by himself or his deputy, by a writing under his hand, enter of record such commission, &c." On a liberal construction of the act, it might possibly be implied that power was given to such officer to certify his enrolment, and then his certificate would, as we have seen in other instances, be sufficient evidence of the copy; but the safer way would certainly be to prove it examined with the original also.

[66]

It is a general rule, applicable to all proceedings in courts of equity, that in order to give in evidence an answer, depositions, affidavits, or any other interlocutory proceeding in a cause, a foundation must first be laid by proof of all the former stages of it[1]; as the bill to make way for the answer[2]; the bill and answer, or that the defendant was in contempt,

[1] Roch v. Rix, Gilb. Law Ev. 56.

[2] Piercy v. Sir T. Jones, 164; Gilb. Law Ev. 65.

as

as the foundation for the depositions, and so on; otherwise two inconveniences would follow; first, that the whole context and bearing of the evidence would not appear; secondly, that the court could not see whether it was a regular proceeding; and if not, then the answer or depositions would have only the effect of a mere voluntary affidavit, which, if made by a stranger, could not be received as any evidence at all, because there the party would have no opportunity of cross-examination; and if by the party, then only under the circumstances and manner before stated; but where on a bill filed for the examination of witnesses, the court of equity made an order before answer or contempt, that a witness who was going abroad should be examined, and a copy of the interrogatories was handed over to the adverse party, and after examination another order was made for publication, with the express view of his deposition being read on a trial at law, it was held that the deposition might be read though the party did not in fact cross-examine the witness. As to the interrogatories, it may be taken as a general rule, that the question proposed by them should not be leading. If depositions are taken in answer to such interrogatories in the Court of Chancery, that court will suppress them; and the like would be done on depositions taken in a court of law under a commission. But where ancient depositions were produced, which had been in other respects duly taken, and suffered to pass publication in the Court of Exchequer, the Court of King's Bench held them to be admissible in evidence, although the interrogatories were so leading as necessarily to dictate the answer to be given.

Style, 446.

[67]

Cazenove *v.* Vaughan, 1 M. & S. 4.

Williams *v.* Williams, 4 M. & S. 497.

In order further to explain what is before said, as to the necessity of the proceedings being regular,

Ch. II. s. 2. *General Rule as to Chancery Proceedings.*

to make the depositions evidence, it may be necessary here to mention, that the distinction which has been taken in the books, as to the regularity of proceedings is this,—if the bill be dismissed because the plaintiff is irregular in his proceeding, as where a devisee, on a suit commenced by his devisor, brings a bill of revivor, and several depositions are taken, and then the cause on hearing is dismissed, because a devisee claiming as a purchaser, and not by representation, cannot bring a bill of revivor; in this case, the depositions can never be read in any other cause, because there was no cause regularly before the court: but if a cause was once properly before the court, though the bill was dismissed because it was not a matter fit for equity to decree, the depositions will be evidence.

Blackhouse *v.* Middleton, 1 Ch. Cas. 173. Smith *v.* Veale, 1 Lord Raym. 735.

We have before seen that even a judgment, when destroyed, may be proved by secondary evidence: this rule applies universally to every species of evidence, and, therefore, where it appeared from the evidence of the proper officer, that the office had been searched, and the bill could not be found, the answer was permitted to be read without it, so ancient depositions have been received as evidence without bill or answer; but to entitle a party to deviate so much from the general rule, they ought certainly either to be fortified by great length of time, or else some other reasonable evidence be given, that the bill had been once there, and in what way it had been lost.

Roch *v.* Rix, Gilb. Law Ev. 56. Vide 5 Mod. 211. Bryam *v.* Booth, 2 Price, 234. Blower *v.* Ketchmore, 2 Keb. 31.

[68]

The decree is evidence on the same principle as a judgment in a court of law, and subject to the like rules, viz. that where it respects private property or individuals, it is only evidence against parties to the suit, or others claiming through them; but when the question is of a public nature, it is then evidence against

Case of Manchester Mills, Doug. 222l, note (13).

against all persons standing in a similar situation with the parties to it.

While the decree remains in paper, it cannot be read in evidence for the purpose of proving its contents, without also proving copies of the bill and answer, unless they are recited at length in it [1]; but when the only object of the evidence is to show that a decree was in fact made, or the decree has been exemplified, under the seal of the court, and enrolled, it is of itself evidence; and the opposite party may, in the latter case, show that the point in issue in that suit was different from that before the court (*q*).

[1] Lord Thanet *v.* Patterson, Bul. N. P. 235.

Of the same authority as answers, depositions (*r*), and decrees of the courts of equity, are the depositions, answers to libels, and sentences in the *ecclesiastical* and *admiralty courts*, on a question arising within their respective jurisdictions [2].

Therefore, probate of a will of personal property, letters of administration [3], or a sentence in a matrimonial cause in the one court, or an adjudication of prize, &c. in the other, are evidence of the rights of the parties. The right to personal property, under a will, can be proved by no other evidence than the probate [4]; and while that exists, no person whatever can be permitted to show that it was improperly granted, or after it is repealed to

[2] Vide Gilb. Law Ev. 67. 2 Mod. 231. Mildmay *v.* Mildmay, 1 Vern 53.

[3] Kempton *v.* Cross, Cas. Temp. Hard. 108.

[4] Rex *v.* Inhabitants of Netherseal, 4 T. Rep. 258.

(*q*) In the case of *Wheeler* v. *Louth*, Guildhall, 9 Ann. (Com. Dig. Ev. c. 1.) it was held by *Trevor*, C. J. that if the bill and answer were recited in the decretal order, it was sufficient; but if only so much is recited as is deemed necessary to introduce the decretal part, the bill and answer must be proved. Dougl. 579. And doubts have been entertained whether the decree under seal, which does not state the bill and answer, can be read, without a foundation being laid for it by evidence of those proceedings. Vide *Trowell* v. *Castle*, 1 Keb. 91.

(*r*) In *Mildmay* v. *Mildmay*, a doubt was made whether depositions in the spiritual courts were admissible; it is clear they are not, when taken in any cause not within their jurisdiction, but where they have jurisdiction, there seems to be no objection. *Vide* Gilb. Law Ev. 67.

Ch. II. s. 2. *Proceedings in Foreign Courts.*

avoid any payment which has been made under it [1]: But it may be shown that the seal to the probate was forged, or that letters of administration have been repealed [2], to prevent any right being claimed under them, for that does not controvert the judgment of the ecclesiastical court, but shows that no such judgment exists. So too, where an inferior court grants probate, it may be proved that the testator left *bona notabilia* [3], for that shows that the ecclesiastical court had no jurisdiction, and consequently, that the whole is void, as being *coram non judice* (*s*).

[1] Allen *v.* Dundas, 3 T. Rep. 125.

[70]

[2] Noel *v.* Wills, 1 Sid. 359. Chichester *v.* Phillips, Sir T. Raym. 405.

[3] Ibid.

From what has been already said, it may be collected that the probate of a will cannot be received as evidence for any purpose, in a question concerning freehold lands; for as to that they have no jurisdiction.

The judgment, or sentence of a foreign court, is received in our courts as evidence of the right it establishes, or the fact directly found by it. Indeed, when the party who claims the benefit of it applies to our courts to enforce it, and voluntarily submits it to their jurisdiction, they treat it not as obligatory to the extent to which it would be in the country where it was pronounced, nor to the extent to which by our law sentences and judgments are [4]; and therefore though in an action upon a foreign judgment, the judgment is *prima facie* evidence of the debt, it is not conclusively so; but our courts will examine into it, and for that purpose, receive evidence of what the law of the foreign state is, and whether the judgment is warranted by that law [5]. In all other cases, our courts give entire faith and credit to the sentences of foreign courts, and consider them as conclusive [6]:

[4] Per Eyre, C.J. 2 H. Black. 409.

[5] Walker *v.* Whitter, Dougl. 1.

[6] Per Eyre, ut supra.

[71]

(*s*) See further as to these sentences, *post*, 73.

Therefore,

Therefore, if a man be acquitted of a crime [1] committed in a foreign country, or discharged from a demand arising there [2] by the sentence of its courts, or the validity of a marriage contracted there [3] be decided by such sentence, the sentence is conclusive of the fact established by it. So if, on a libel against a ship, any question arise on the *law of nations*, and a foreign court of admiralty, acting on that law, adjudge a ship to be a lawful prize, for breach of neutrality, being enemies property, or other fact, which by the law of nations is cause of forfeiture; the sentence is complete and conclusive evidence of the *fact* on which it is founded against all the world; and if they state the *evidence* from which they drew the conclusion, no court in this country can take into their consideration, whether such conclusion was right or otherwise [4]. Nor will the sentence be void on account of the court having arrived at the conclusion on rules of evidence, or presumptions established by particular ordinances, and *not generally acknowledged* [5]. In this case, however, the adjudication is only evidence of the *conclusion* on which the condemnation is founded, such as the property belonging to an enemy, or the like, and not of the *facts* stated by way of evidence.

Also, if a foreign court of admiralty condemn a ship as lawful prize without assigning any cause, it is evidence that she was not neutral [6]: but if the foreign court state the facts, on which they found their condemnation, and it appear from those facts, and also from the conclusion they have drawn, that the condemnation was not for any violation of the law of nations, but for not complying with some arbitrary regulation of their own; as where a belligerent state having made certain ordinances which had not been assented to by a neutral state, seized

[1] Hutchinson's case, 1 Show. 6.

[2] Burrows *v.* Jemino, 2 Show. 733.

[3] Per Lord Hardwick, 1 Ves. 159.

[4] Vide Park's Insur. 353. Garels *v.* Kensington, 8 T. Rep. 230. Christie *v.* Secretan, 8 T. Rep. 192. Ibid.

[5] Bolton *v.* Gladstone, 5 East, 155; 2 Taunt. 85. Baring *v.* Roy. Ex. Ass. Co. 5 East, 99.

[6] Saloucci *v.* Woodmass, Park, 413. Saloucci *v.* Johnson, Park, 415.

Ch. II. s. 2. *Proceedings in Foreign Courts.*

a ship belonging to such state and declared her prize, because she had not navigated according to those ordinances, the sentence is void altogether, and of no force in any court of justice[1]. In like manner, as it is necessary that the *subject* should be within their jurisdiction, it is also necessary that the *court* itself should be one regularly established, and acknowledged by the law of nations, and not a mere arbitrary institution; wherefore a condemnation before the consul of a belligerent state, resident in a neutral country, was considered as a mere nullity[2]; but such a proceeding before the consul of one belligerent state resident in another, in alliance offensive and defensive with it, has the same effect as if taken in the state appointing the judge who condemns; for the interests of the two states being united, one may authorize the other to erect a court, acting on the law of nations, for their common benefit, at any place within the hostile territory[3].

[1] Calvert *v.* Bovil, 7 T. Rep. 523. Mayne *v.* Walter, Park, 414. Pollard *v.* Bell, 8 T. Rep. 434. Bird *v.* Appleton, Ibid. 562.

[72]

[2] Havelocke *v.* Rockwood, 8 T. Rep. 268.

[3] Oddy *v.* Bovil, 2 East, 473.

The proof of these proceedings has generally been by copies under the seal of the court in which they were; there seems to be no objection to the seal of a court acting on the *law of nations*, being received as evidence of itself; but, in my first edition, I hazarded an opinion, that to prove the seal of a mere municipal court, some evidence should be given of its authenticity; and a case which has been since determined in the Court of King's Bench has confirmed that opinion; for in an action on a judgment obtained in the island of Grenada, though the plaintiff proved the hand-writing of the judge of the court subscribed to the judgment, yet, as he could not prove the seal affixed to be the seal of the island, he was considered as having failed in his proof, and the court, on motion, confirmed the nonsuit obtained on that ground. Nevertheless, as the court did not

Henry *v.* Adcy, 3 East, 221.

[73]

go

go much at length into the reason for requiring such evidence, it may not be improper to retain the note which was inserted in the former edition (*t*).

It

(*t*) It was held in an anonymous case, 9 Mod. 66, that an exemplification of the proceedings of a court in Holland, under the seal of the *States*, was sufficient evidence without further proof; but this, I conceive, is not an authority to show that the seal of the *court* in that country, acting on its own laws, would have been sufficient; and the case of *Swinnerton* v. *Goddard*, therein cited, seems to warrant the distinction; for it was there held, on appeal to the House of Lords, that an exemplification of a judgment of the Court of King's Bench in England, which (for aught appearing to the contrary, was under the seal of that court) was not sufficient evidence of the judgment before the Court of Session in Scotland. It is true that the distinction taken by the court was, that in the one case the record was the direct matter in issue, and in the other but inducement. But, in addition to this, it may be observed, that the public seal of one *state* is matter of notoriety, and may be taken notice of by another, as part of the law of nations acknowledged by all; but when only the seal of a foreign *court* is put to the copy, it should seem that some evidence should be given of that seal being what it purports to be; for the courts of England cannot judicially take notice of the *laws of other countries*; and, therefore, where a contract is to be construed according to the laws of the country in which it was made, witnesses are examined to prove what those laws are. 1 P. Will. 431. A distinction has long prevailed between public and private seals; the first (those of the superior courts in this country) are considered, as is observed above, as part of the law of the country, and therefore are judicially taken notice of by its judges; but the seal of a private court, or private individual, should be proved by evidence. *Vide* Gilb. Law Ev. 20. In *Moises* v. *Thornton*, 8 T. Rep. 303, it was held that the bare production of an instrument, purporting to be a diploma under the seal of the University of St. Andrew's, was not sufficient: but in the case of *Doe* dem. *Woodmass* v. *Mason*, 1 Esp. Cas. N.P. 53, the seal of the Corporation of London was held to prove itself. From what is said by the court in *Moises* v. *Thornton*, it may be collected that the like evidence would not be sufficient of the seals of other English corporations, and there appears good reason for making a distinction between them and that of the Corporation of London; its privileges have been confirmed by parliament, and its seal is so common as to be known to almost every man.

Letters of administration under the seal of the Prerogative Court of Canterbury, prove themselves in a cause respecting personal property. *Kempton* v. *Cross*, Cas. temp. Hard. 108. And where a bill of exchange has been protested in a foreign country for non-acceptance or non-payment, the protest under the seal of

Ch. II. s. 2. *Proceedings of inferior Jurisdictions.*

It was before observed, that if a man be acquitted of a crime, or discharged from a demand in a foreign country, he cannot be again impleaded on the same account in this. It may be added, that all matters of contract or of right are to be judged of according to the law of the country wherein they arise; in such cases, therefore, the laws of foreign countries frequently become the subject of inquiry in our courts of justice, and when such a question arises, the foreign law, if in writing, must be proved by a copy properly authenticated. But when the unwritten laws of a foreign country become the subject of inquiry, such laws are proved by the parol examination of witnesses of competent skill and knowledge.

Vide Clegg *v.* Levy, 3 Campb. 169. Miller *v.* Hennick, 4 Campb. 155. Buchanan *v.* Rucker, 1 Campb. 63. Richardson *v.* Anderson, there cited, and 1 P. Will. 431.

Judgments in a court baron, county court, or other *inferior court,* though not records, are also evidence. In cases, however, where it has been requisite to prove their proceedings, the general practice has been to produce the book containing the original minutes, as well those previous to the judgment, as the judgment itself (for in the case of all inferior jurisdictions, whether ecclesiastical or civil, it must be shown that the proceedings are regular); and as it is not usual to draw up such judgments in form, this evidence has been held sufficient to support an action on the judgment of the county court [1], or to prove the proceedings in a foreign attachment in the court of the lord mayor of London [2], or a discontinuance [3] of a suit in the sheriff's court there;

[74] Vide Com. Dig. Evid. (C.) 1.

[1] Chandler *v.* Roberts, Exchq. Trin. 39 Geo. 3.

[2] Fisher *v.* Lane, 2 Black. 836.

[3] Arundel *v.* White, 14 East, 216.

a notary public has been usually received as sufficient evidence of the presentment, without proof even of the protest having been signed by him, or that the seal affixed is what it purports to be. *Vide* 2 Roll. Rep. 346. 10 Mod. 66. This seems to be a relaxation of the strict rules of evidence for the convenience of the mercantile world; who, in such cases, give credit to instruments of that nature.

but

but in this case the defendant is not precluded by the judgment from disputing the original jurisdiction of the court, and pleading that the cause of action arose out of that jurisdiction [1].

[1] Vide Herbert *v.* Cooke, Willes, 36, note (*a*).

If the parties think proper to submit their differences to an arbitrator, his judgment is as conclusive upon them, as that of a court established by the law; and though in questions respecting land he cannot absolutely convey property from one to another, but can only order it to be done; yet if he determine the right to be in one, this is conclusive evidence of the title, and cannot be disputed in an action of ejectment [2]. The award, whether made on a parol, or a written submission, may be given in evidence on a count in *assumpsit*, founded on the original consideration [3], or on an account stated [4]. But to enable the party in whose favour the award was made to avail himself of it, he must not only prove the award, but in the case of a parol submission prove his own as well as the other party's assent to it [5]; and where it is in writing prove the execution of the deed of reference, and that by all parties; for if it does not appear to have been so executed, there was no consideration for the submission of the defendant [6]. The award must have the stamp imposed by the legislature, but when two arbitrators are at liberty to appoint an umpire, their appointment requires no stamp [7].

[2] Doe dem. Morris *v.* Roper, 3 East, 15.

[3] Kingston *v.* Philps, Peak N. P. Cases, 227.

[4] Keen *v.* Batshore, 1 Esp. 194.

[5] Kingston *v.* Philps, ubi supra.

[6] Antram *v.* Chace, 15 East, 209.

[7] Routledge *v.* Thornton, 5 Taunt. 704.

General Observations as to the effect of Sentences.

Having, when speaking of the different courts individually, but slightly mentioned the cases in which judgments or sentences of those courts would be evidence, I shall now proceed to collect, into one view, the general rules which are applicable to all.

It was before observed that the judgment, sentence, or decree, of the same court, or one of *concurrent* jurisdiction, *directly* upon the point, may be pleaded

Vide 11 St. Tr. 261. Ante, 37, &c.

as

Ch. II. s. 2. *General Observations as to the effect of Sentences.*

as a bar, or given in evidence as *conclusive* between the same parties *upon the same matter* directly in question: and in like manner, the judgment of a court of *exclusive* jurisdiction, *directly* upon the point, is *conclusive* upon the same matter between the same parties coming *incidentally* in question in another court for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction, is evidence of any matter which came *collaterally* in question, though within their jurisdiction; nor of any matter *incidentally cognisable*; nor of any matter to be *inferred by argument* from the judgment.

[76]

Vide 11 St. Tr. 261.

Judgments which are merely on questions of property between party and party are, as was elsewhere observed, evidence only between the parties, or those claiming under them; but those *in rem*, or in the ecclesiastical courts, on matrimonial causes, are evidence against third persons. In these cases nevertheless, a stranger is always at liberty to show that such judgment, sentence, or decree, was obtained by fraud and collusion between the parties to it; for fraud is an extrinsic collateral act, which vitiates the most solemn proceedings of courts of justice, and though it is not permitted to show that a court was *mistaken*, it may be shown that it was *misled:* but the parties to them are not permitted to avail themselves of their own fraud.

Vide 4 Co. 29, a. Hervey's case, note (r). Vide 11 St. Tr. 262. 2 Ves. 246.

Conformably to these general principles, the following decisions have taken place:

[77]

If a question of legitimacy arise *incidentally* upon a claim to a real estate, a sentence of *nullity*, or one in *affirmance* of a marriage in the ecclesiastical court, is *conclusive* evidence against the parties, or those who have acquiesced in the sentence, and all claiming under them; as where *A.* and *B.* being married, *C.* libelled against the wife on a pre-contract, which the

the spiritual court enforced, and *B.* and *C.* afterwards married, living the first husband, and had a son, who brought an ejectment, and made out his title as heir to his grandfather; it was held, that the sentence was *conclusive* evidence of his legitimacy[1]; and in like manner, where two persons had married within the age of consent, and the ecclesiastical court pronounced a sentence of divorce on that ground, this sentence was held conclusive of that fact, as against the children of the marriage, and destroyed their legitimacy[2]. So a sentence in a cause of *jactitation*, has been held *conclusive* evidence against the issue in an ejectment[3]. And where an action has been brought upon a contract of marriage, or for adultery with the plaintiff's wife, a sentence in the ecclesiastical court against the contract in the one case[4] (*u*), or declaring the supposed wife free in a *jactitation* cause in the other[5], is conclusive evidence.

So a sentence of expulsion unappealed from, given in evidence on an ejectment or indictment for assaulting a fellow-commoner of Queen's College, Cambridge, by turning him out of the gardens, is *conclusive* for the defendant, and consequently evidence on the part of the lessor of the plaintiff or prosecutor to prove the irregularity of the sentence, is inadmissible[6]. And a conviction before a magistrate, having competent jurisdiction, is, till quashed or reversed, conclusive evidence in favour of the justice in an action against him for false imprisonment[7].

In all these cases the parties to the suit were parties to the sentence or conviction, or had ac-

[1] Bunting's case, 4 Co. 29.

[2] Kenn's case, 7 Co. 41.

[3] Jones *v.* Bow, Carth. 225.

[4] Dacosta *v.* Villa Real, 2 Stra. 961.

[5] Clewes *v.* Bathurst, 2 Stra. 960.

[6] Rex *v.* Grunden, Cowp. 315. Phillips *v.* Bury, 1 Lord Raym. 5.

[7] Strickland *v.* Ward, Winchester Sum. Assizes, 1757, cor. Yates, J. 7 T. Rep. 633, note.

[78]

(*u*) This case was before the statute 26 Geo. 2, c. 33, by the 13th section of which statute, it is enacted, that no suit shall be had in the ecclesiastical court, to compel a celebration of marriage, by reason of any contract.

quiesced

Ch. II. s. 2. *Judgments of exclusive Jurisdictions.*

quiesced under it, or claimed under those who stood in that situation; and for the same reason, in the case of the *Duchess of Kingston*, Lord *Apsley* considered the sentence of the ecclesiastical court, declaring her free from Mr. *Harvey*, to be so conclusive against the heir at law, and next of kin of the duke, as to be pleadable in bar to a bill brought by them to set aside his will on the ground of fraud in the duchess, in imposing herself upon him as a single woman [1], but when the same sentence was offered as *conclusive* evidence against the charge of bigamy, the House of Lords held that it was not so; first, because the king was no party to the first suit, *nor could become so*; and secondly, because the ecclesiastical court had no judicial cognizance of crimes [2]; and upon the same principle it was held by Lord *Ellenborough*, that the probate of a will was no evidence in answer to an indictment for forging the will [3], though the contrary had been previously held [4]. In like manner in *Prudham* v. *Phillips*, (cited Ambl. 762, and several times in the *Duchess of Kingston*'s case,) it was held, that the sentence in the ecclesiastical court, annulling a marriage, might be avoided by third persons on account of fraud and collusion in the parties, though the parties themselves were estopped from showing their own fraud. So, though a judgment of ouster against one corporator is admissible against another deriving title through him, to prove that the person ousted had no title [5]; and the conviction of a principal felon may be received, to prove the felony committed, against the person indicted as an accomplice, yet they are neither of them conclusive evidence of these facts, but may be controverted by the party against whom they are so read [6].

[1] Ambl. 756.

[2] Vide 11 St. Tr. 261.

[3] Rex v. Gibson, Lancaster Sum. Assizes, 1802. 2 Evans's Pothier, 356.

[4] Rex v. Vincent, 1 Stra. 481.

[5] Rex v. Grimes, 5 Burr. 2598.

[6] Vide Forster Cr. L. 364.

But in an action against Mr. *Harvey*, by a creditor of

of his supposed wife (they living separate,) he showed a sentence in a cause of jactitation declaring against the marriage, and that not being impeached by the creditor, was considered as conclusive evidence against the marriage, though it was afterwards reversed on appeal [1].

[1] Vide 11 St. Tr. 235.

In cases where every person has an opportunity of coming into court, and being made a party to the suit, as in all proceedings *in rem*, and probates of wills, the sentence or grant of probate binds *all persons*, and none can be permitted to impeach the proceedings in another suit, when it comes incidentally in question [2].

[2] Vide 11 St. Tr. 218. 222.

When any *public measure* has been adopted by the government of this country, it is usual to announce such measure to the public by means of a gazette, which is published under the sanction and control of government; and of any *act of state* so announced, this gazette is of itself sufficient evidence [3]; the *king's proclamations, addresses* from the people to the crown, and the like, may be proved in this manner without a production of the proclamation or address itself, for these being matters of public notoriety, communicated to the public in a known prescribed form, the law pays such attention to the established rules of office, as not to call for higher evidence than that to which all mankind look for information on the subject. For the same reason, *proclamations* [4], and the *articles of war* [5], as printed by the king's printer, are received as sufficient evidence of such instruments having been duly issued; and where a proclamation recited, that it had been represented that outrages had been committed in different parts of certain counties, and offered a reward for the discovery and apprehension of the offenders, such proclamation was admitted as evidence to prove an introductory

[79]

[3] Rex v. Holt, 5 T. Rep. 436.

[4] Bul. N. P. 226.

[5] Rex v. Withers, cited 5 T. Rep. 442.

Ch. II. s. 2. *Acts of State.*

introductory averment in an information for a libel that divers acts of outrage had been committed in those parts; and the recital in an act of parliament of such outrages, and making provision against them, was held to be admissible for the same purpose [1]. The register of the navy office [2], with proof of the method there used, to return all persons dead with the mark *Dd*, is sufficient evidence of death; as is the daily book [3] of a public prison, to prove the time of a prisoner's discharge; or an entry in the books kept by the quarter sessions, to prove not only the prisoner's discharge, but that he was actually a prisoner on the day when he appeared to be so by the entry [4]. So the log-book of a man of war has been received, to prove when a ship became part of her convoy [5]: And entries in the books of the clerk of the peace of deputations formerly granted to gamekeepers, as evidence of a right of manor in the person granting such deputations [6].

[1] Rex *v.* Sutton, 4 M. & S. 532.

[2] Bul. N. P. 249.

[3] Rex *v.* Aikles, Leach. Cas. 435.

[4] Doe d. Cookson *v.* Thorp, 5 M. & S. 72.

[5] D'Israeli *v.* Jowett, 1 Esp. Cas. 427.

[6] Hunt *v.* Andrews, 3 B. & Ald. 341.

But though the book of a public prison is sufficient to prove the *time* of a commitment or discharge, yet the *cause* of imprisonment must be proved by other evidence; and therefore, in a question of bankruptcy, where the supposed bankrupt had been two months in prison [7], it was held that, to prove the fact of his imprisonment having been *for debt*, the original *committitur* should have been produced; and though an entry made at the custom-house, of the transfer of a ship, would be good evidence against the person making the affidavit of his property in the ship [8], yet it is not even *prima facie* evidence *against* a stranger named in it, and who gave no authority for the insertion of his name [9], nor *for* the person making it, without proof of his possession [1]; for in this case, it should be observed, that the

[7] Salte *v.* Thomas, 3 Bos. & Pul. 188.

[8] Cooper *v.* Smith, 4 Taunt. 302. Frazer *v.* Hopkins, 2 Taunt. 5.

[9] Tinckler *v.* Walpole, 14 East, 226.

[1] Lane *v.* Anderson, 4 Taunt. 642.

Ch. II. s. 2. *History.*

the officer making the entry only records the fact stated to him by others.

It is agreed, that to prove a *particular custom*, a printed history is no evidence; and therefore, when *Cambden's Britannia* was offered in evidence on an issue, whether, by the custom of Droitwich, salt pits might be sunk in any part of the town, or in a certain place only, it was rejected; and *Dugdale's Monasticon* was also refused on a question, whether an abbey was inferior or otherwise. But it was said, that in the case of *Stainer* v. *Droitwich*, that a general history was sufficient evidence of a matter relating to the kingdom in general; and the case of *St. Catherine's Hospital* was cited, where a chronicle was said to have been allowed as evidence to prove a particular point of history in the time of Edward III. From the report of that case, it appears, that the question being whether the patronage of the hospital was in the queen dowager or the queen consort, a record in Edward the Third's time was produced, wherein Isabel, the queen of Edward II. though living, was stiled *super Regina*, and the right determined to be in the queen consort. *Speed*'s Chronicles were produced, "to show that at that time queen Isabel "was under great calamity and oppression, and that "what was then determined against her was not so "much from the right of the thing as the iniquity "of the times, so that (as is observed in the report) "that authority was much invalidated from the cir-"cumstances of the time." The same point was again made in a subsequent case, and the book being produced, as is said in the report, to prove the death of queen *Isabel*, *Dolben* said, the evidence was received by consent; but the chief justice *(Pemberton)* said, he knew not what better proof they could have; and *Wallop* said, that in the *Lord Bridgewater's* case, the

[80]

Stainer v. Burgesses of Droitwich, Salk. 281. 12 Mod. 85. S. C.

1 Vent. 149.

Lord Brounker v. Sir R. Atkyns, Skin. 14.

[81]

Ch. II. s. 2. *History.*

the House of Lords admitted it as good evidence. On this case, as reported by *Ventris*, we may observe that it was admitted merely as evidence of the general reputation of the time, that the mother of the reigning monarch was unkindly treated by him, and for the purpose of showing the ground on which a judgment, evidently wrong, proceeded.

The fact thus proved was matter of public notoriety, which, if it had happened just before the time, the judges in a case within their province, or a jury, if it was submitted to them as a question of fact, would take judicial notice of. Thus, Mr. J. *Forster* says, if a man be indicted for treason, in adhering to the king's enemies, the fact, whether war or no, is triable by the jury, and the public notoriety is sufficient evidence of that fact.

Disc. on Treason, c. 2, s. 12.

But another case is also mentioned in the reports of *Stainer* v. *Droitwich*, (both in Salk. and 12 Mod.) which, if correctly stated, would tend to admit such evidence to fix the particular dates of transactions not very remote from the time of trial. It is cited in 12 Mod. by the name of *Neale* v. *Jay*, and in Salk. by that of *Neale* v. *Fry*; in the latter book it is stated to have passed about twelve years antecedent to that time, and is thus cited: "A deed was produced, said to be made 1 *Philip & Mary*, wherein all the titles were given to *Philip*, which he used after the surrender of *Charles* the Fifth. Now though *Charles* had then surrendered, yet *Philip* did not take the titles upon him till that surrender had been received by the council of Spain, which was six months after, so that the deed must needs have been forged; *and, to prove the time of receiving that surrender, chronicles were produced and admitted as evidence.*" Mr. J. *Buller* has implicitly followed the report in 12 Mod. citing this case from it by the name

[82]

Bul. N. P. 248.

name of *Neale* v. *Fry*, and I, in the first edition of this work, was led into the same error by Salk.; but upon looking farther into this authority, it is plain that the person who cited the case did not correctly state it. From the date and name of one of the parties, there can be no doubt but that the case of *Mossam* v. *Ivy*, 7 St. Tr. 571, was the case alluded to. That case happened in Trin. Term 1684; it was an ejectment on the demise of *Neale*, and Lady *Ivy* the defendant setting up two deeds, dated 13th November, and 22d of December, 3 *Philip & Mary*, (not 1 *Philip & Mary*, as stated in Salk.) the plaintiff showed, by the titles to several acts of parliament, and other records of this kingdom, that even then *Philip* had not assumed the titles which were given to him in the deeds; but it does not appear from the report in the State Trials, which, like most others in that collection, contains *verbatim* every thing which passed, that the plaintiff even offered to read any chronicles in evidence. The defendant, on the contrary, did offer such evidence to show when *Charles* resigned, and it was rejected by the court, the chief justice *(Jefferys)* saying, "Is a printed history, written by I know not who, evidence in a court of law?" The attention to which such history is entitled, even if it be at all admissible, is certainly not much, and no stronger instance can be adduced of the danger of relying on it, than this of the time when *Philip* first assumed his title, for by the laborious industry of Dr. *Robertson*, we are acquainted with the extraordinary fact, that though the date of the instrument, by which *Charles* resigned his imperial crown to his son and successor, is agreed to be the 25th of October 1555, yet the day, and even the month when he actually invested Philip with the government, though a public and

Mossam v. Ivy, 7 St. Tr. 571.

[83]

7 St. Tr. 601.

Robertson's Charles 5. Bk. 11.

Ch. II. s. 2. *Surveys and Inquisitions.*

notorious act, is disputed by the best and most accurate historians of the time; and that the precise time when he resigned his Spanish dominions is no less a subject of controversy amongst them (*y*).

[84]

Surveys, taken on public occasions, are evidence to ascertain the rights of individuals not named in them: thus doomsday-book, which was a survey of the king's lands, made in the time of William the Conqueror, is the only evidence to prove whether a manor is held in ancient demesne, that is, whether it was part of the soccage tenure in the hands of Edward the Confessor, or not; and so high is the credit of this book, that the inspection is made by the court. So if a question arise as to the extent of the ports, there lies in the Exchequer a particular survey which ascertains it; and in many instances, where a commission has been confined to a particular place, it has been received as admissible evidence; as where a commission issued out of the Exchequer in the reign of Queen Elizabeth, directing commissioners to inquire whether a prior was seised of certain lands, as parcel of a manor, and whether, after the dissolution of the priories, the crown was seised, with directions to summon a jury; an inquisition taken under it, and the depositions of the witnesses were held to be admissible, though not conclusive evidence of the fact. In like manner an inquisition taken in the time of the Commonwealth, by order of the then existing government, to ascertain the extent of the lands belonging to the prebend of the moor of St. Paul's, was received against a person claiming under them as evidence of the extent of their rights; and that taken under the direc-

Hob. 188.

Gilb. Law Ev. 78.

Tooker v. Duke of Beaufort, 1 Burr. 146.

Doe dem. Powell v. Harcourt, K. B. Sittings after East. Term. 39 Geo. 3. Append.

[85]

(*y*) See also Hume's Hist. vol. iii. 234 and note (*I*) at the end of that vol. for instances of inaccuracy in our own historians.

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tion of the House of Commons, in the year 1730, as conclusive evidence of the tenure and fees of the different offices noticed in it[1]. So an ecclesiastical survey is not only admissible, but strong evidence to prove an endowment; and aided by the perception of small tithes (although not of all) will give the vicar a right to tithes of articles of modern introduction against the lessee of the rector[2]. And even when the commission has been lost, the survey taken under it has been allowed as evidence[3]. These, and many other cases of a similar nature, have proceeded on the ground that the act being done under the direction of the public, for the purpose of determining a public question, is entitled to a degree of credit which no act of an individual is.

Ch. II. s. 2. *Surveys and Inquisitions.*

[1] Green v. Hewitt, Peake N. P. 182.

[2] Cunliffe v. Taylor, 2 Price, 329.

[3] Vicar of Killington v. Tr. Col. 1 Wils. 370.

Inquisitions taken before the sheriff, &c. on ordinary occasions, are of very different authority; they are in their nature traversable, and are therefore seldom admitted as evidence against third persons. In one case, the judges of the Court of King's Bench were equally divided on the question, whether the coroner's inquest, whereby a man was found to be *non compos mentis*, was admissible against his executrix as evidence of his insanity; and it has also been determined, that an inquisition taken by the sheriff, to ascertain to whom goods seized by him, under an execution against *A.* belonged, by which the property was found to be in *B.* was no evidence either for *B.* in an action brought by him against the sheriff[1], or for the sheriff in an action for a false return of the execution[2].

Inquisitions.

Vide 2 H. Black. 437.

Jones v. White, 1 Stra. 68.

[1] Latkow v. Eamer, 2 H. Black. 437.

[2] Glossop v. Pole, 3 M. & S. 175.

The *register* kept in churches of *births, marriages, and burials*, is also evidence, and in all civil cases, except actions for criminal conversation, a marriage may be proved by reputation[3]; but in this case, and on indictments for bigamy, either some person pre-

[86] *Parish Registers.*

[3] Morris v. Miller, 4 Burr. 2057.

Ch. II. s. 2. *Parish Registers.*

sent at the marriage must be called, or the original register, or an examined copy of it produced (z), in which case the parties may be identified by any one acquainted with them, whether present at the marriage or not. But the books of the Fleet, however corroborated by other circumstances, are not, in any case, received as evidence of a marriage; not because a marriage celebrated there was not good, for such it clearly was before the marriage act; but because the manner in which those marriages were celebrated, and the conduct of the persons who, without any legal authority, assumed the power of registering them, have thrown such an odium on

Birt v. Barlow, Dougl. 162.

[87]

(z) In *May* v. *May*, 2 Stra. 1073, on a question of legitimacy, it appeared that a general register-book was kept in the parish, into which the entries of baptism were made every three months from a day-book into which they were made at the time. In the day-book were put the letters B B, which were said to signify base born; but these letters were not inserted in the register-book. *Probyn* and *Lee*, justices, were of opinion, that the register-book, being the public book, was to be considered as the original entry from which evidence was to be given, and that it could not be controlled or altered by any thing appearing in the day-book. *Page*, J. was of contrary opinion.

The following case was decided upon the same principles:

Rex v. *Head*, Worcester Spr. Assiz. 1762, cor. Noel, J. M. S. In an information for bribery, the prosecutor, to prove the party a freeman of Evesham, produced upon a 2*s.* stamp a copy of a loose paper upon a file, which the witness said was also on a 2*s.* stamp, to this effect: "Borough of Evesham, A. B. admitted to his freedom such a day." It appeared that there was a book, in which the acts of the corporation were kept, and where there was an entry more at large of the freeman's admission, and which was made when the party was originally admitted; but this was not on stamp in the book; and it was objected, that this being the original book of the corporation, a copy of *this* should have been produced; but it appearing that such entry in the book was never upon stamps, but the short entries were filed upon stamps, and kept amongst the corporation papers, *Noel*, J. said, that this entry being the only effectual act, as having that which the law requires, viz. the proper stamp, must be looked upon as the proper and original act of the corporation, and therefore a copy of it was good evidence.

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those books, as to take from them even the authority of a private memorandum (*a*).

Ch. II. s. 2. *Rolls of Courts Baron.*

The *rolls of courts baron* are also received to prove the admissions, &c. of tenants, and either an examined copy, or one signed by the steward, may be read; so also rolls which contain entries of descents, &c. are evidence between the tenants to prove the customary course of descent within the manor; and even an entry on an ancient roll of a finding by the homage what the customs were, though not accompanied by any particular instance, or supported by other evidence, is itself admissible evidence to prove the custom; for this not being the claim of a private individual, but as it were the *lex loci*, tradition and received opinion, is evidence of it. On the same principle a customary of the manor of great antiquity, though not properly a court roll, nor signed by any person, but delivered down with the rolls from steward to steward, has been deemed good evidence; and where a parchment writing, dated about a century since, and purporting to be signed by many persons copyholders of the manor, stated, that the commoners had an unlimited right, which having been found inconvenient, they had agreed to stock the common in a certain restricted manner; such instrument was deemed to be evidence of the reputation of the general right, although not proved to have been signed by a majority of the copyholders of the manor, nor that the person against whom it was produced held the copyhold tenement of any one of those who had signed it.

Bul. N.P. 247.

Doe dem. Mason v. Mason, 3 Wils. 63. Roe dem. Beebee v. Parker, 5 T. Rep. 26.

[88]

Den dem. Goodwin v. Spray, 1 T. Rep. 466.

Chapman v. Cowlan, 13 East, 10.

(*a*) So ruled by Lord *Kenyon* in *Reed* v. *Passer*, Peake's Cas. 231; Esp. 213, S. C.; and by Lord C. J. *De Grey* in *Howard* v. *Burtonwood*, C. B. Sittings at Westminster after Trin. T. 1776; and previously by Lord *Hardwicke* and Lord C. J. *Lee*; but in *Doe* dem. *Passingham* v. *Lloyd*, Shrewsb. Summer Assiz. 1794, Mr. J. *Heath* admitted them in evidence. See *Cooke* v. *Lloyd*, Appendix.

Ch. II. s. 2. *Terriers.*

Similar to court rolls and customaries, are ancient *terriers or surveys* of a parish or manor, which are either ecclesiastical or temporal. The ecclesiastical terriers are surveys made by virtue of the 87th canon, and are thereby ordered to be kept in the bishop's registry; and Godolphin adds [1], that it may be convenient to have a copy exemplified, and kept in the church chest; wherefore, it was in one case [2] holden, that a paper purporting to be a terrier, found in the charter chest of Trinity College, Cambridge, (who were landholders in the parish) was no evidence to disprove a modus: and indeed it may be laid down as a general rule, that all ancient documents, the authenticity of which are not proved by any extrinsic evidence, should appear to come out of the proper regular custody; thus, an instrument purporting to be an endowment without the seal of the bishop, and another purporting to be an *inspeximus* of the first under his seal, coming out of the hands of a private individual entirely unconnected with them [3]; and in like manner a grant to an abbey, contained in a manuscript intituled *Secretum Abbatis*, and a similar instrument entered in what purported to be a chartalary of a priory, were rejected, though the one was brought from the Bodleian Library [4], and the other from the Cottonian MSS. in the British Museum [5], those places being merely the depositaries of curious antiquities, and not the place in which those to whom the instruments had belonged had deposited them as evidence of their rights. But where a similar chartalary was produced from the documents of a person who had become the owner of part of the estates of the abbey (although not of those in question) it was held by the Court of Exchequer (*Wood*, Baron, Dissent.) to be admissible [6]; and, as against one of the prebendaries of Litchfield, a terrier found

[1] Repertorium Canonicum, Append. 12.

[2] Atkins *v.* Hutton, 2 Anstr. 386.

[3] Potts *v.* Durant, 4 Gwill. 1450.

[4] Mechel *v.* Roberts, cited 3 Taunt. 91.

[5] Swinnerton *v.* Marquis of Stafford, Ibid.

[6] Bullen *v.* Mitchell, 2 Price, 399.

found in the registry of the dean and chapter of Litchfield, was also held to be sufficient evidence [1].

Ch. II. s. 2. *Terriers.*

A terrier is said to be always strong evidence against the parson, and this though not signed by the incumbent of the time; but for him it is never admitted, unless signed by the churchwardens; and, if they are of his nomination, by some of the substantial inhabitants of the parish also [2].

[1] Miller *v.* Foster, cited 2 Anst. 387.

[2] Theory of Evidence, 45. Bul. N.P. 248. Vide Earl *v.* Lewis, 4 Esp. Cas. 1.

Ancient maps have generally been classed under this head of *public writings* not of record, though perhaps they would more properly have been considered as *private instruments*; however, as these are in some degree analogous to terriers, I shall here observe that an ancient map will be received as evidence where it has accompanied possession, and agreed with the boundaries as adjusted by ancient purchases. If two manors are in the hands of the same person, and a map is made by him, and afterwards one of the manors is conveyed to another person; and then, at a distant time, disputes arise as to the boundaries, the map so taken will be evidence; but if the person under whose direction the map was taken, was possessed of only one manor, or a lord describes the boundaries of his waste, or the churchwardens cause a copper-plate map to be made, wherein they describe land which an individual claims, to be a public highway; in any of these cases, the map so taken is not evidence against the rights of persons not parties to the making of it.

[89]

Illingworth *v.* Leigh, 4 Gwill. 1618.

Maps.

Yates *v.* Harris, Hil. Ass. 1702, Gilb. Law Ev. 78. Bridgman *v.* Jennings, Ld. Raym. 734.

Ibid. 1 Stra. 95, S. P.

Pollard *v.* Scott, Peake N.P. 18.

The *pope's licence*, without the king's, has been held good evidence of an impropriation, because, anciently, the pope was taken for the supreme head of the church, and therefore was holden to have the disposition of all spiritual benefices, with the concurrence of the patron, without any regard of the prince of the country, and these ancient matters

Papal Licence and Bull.

Cope *v.* Bedford, Palm. 427.

Ch. II. s. 2. *Papal Licence and Bull.*

must be judged according to the error of the times in which they were transacted.

So also the *pope's bull* is evidence, upon a special prescription to be discharged of tithe, where it is contended that the lands belonged to a particular monastery, and were discharged at the time of the dissolution; for then they continue discharged by the act of parliament: but it is no evidence to prove a general prescription, which can only be from time immemorial, because it shows the commencement of the custom. An exemplification under the bishop's seal, is good evidence of the pope's bull.

[90]

Palm. 38.

Sir T. Read's case, cited Hard. 118.

Corporation books, concerning the public government of a city or town, when publicly kept, and the entries made by a proper officer, are received as evidence of the facts contained in them, so far as those facts go to ascertain the rights of the several members of the corporation *inter se*; but where the corporation is disputing with a third person, as in the case of tolls for instance, entries of other persons having formerly submitted to the demand, however ancient such entries may be, will be no evidence unless accompanied with a charge upon the persons making them, or such other circumstances as are deemed necessary to give authenticity to similar entries in the book of an individual. An old agreement being in the Bodleian Library; whence the Oxford statutes prohibit its removal, a copy was in one case received in evidence; but, in general, that which is in its nature a private instrument, will not, by belonging to a public body, and remaining in their custody for a number of years, gain that degree of credit, which entitles a copy of it to be read in evidence; and therefore where a letter, fifty years old, was found in a corporation chest, the court held that the original must be produced.

Corporation Books.

Rex *v.* Mothersall, 1 Stra. 93.

Marriage *v.* Lawrence, 3 Barn. & Ald. 142.

Downes *v.* Moreman, Bunb. 189.

Rex. *v.* Gwin, 1 Stra. 401.

[91]

Public

Public books of another description have, of late years, come into use, which, though in one point of view, they do not in the least resemble records, but are rather memoranda of the contracts of individuals; yet, as they concern the public in general, and are necessarily confined to one place, judges have, by analogy to the case of records, permitted copies to be read in evidence. Thus it has been held, that to prove a transfer of stock in the *public funds*, copies from the *Bank books* are good evidence; and the like seems to be the case with respect to the books of the *East India Company* (though this point has not been expressly decided), for they are equally within the principle, that "wherever an original *is of a* "*public nature*, and would be evidence if produced, "an immediate sworn copy thereof is evidence."

Ch. II. s. 2. *Bank Books.*

Bretton *v.* Cope, Peake N. P. 30. Vide post, [231].

Vide Doug. 593, note.

3 Salk. 154.

SECTION III.

Of the Inspection of public Writings.

THOUGH all the documents mentioned in the two preceding sections are of a public nature, yet it should be observed they are not for all purposes equally open to the public.

Ch. II. s. 3.

The *proceedings of courts of justice* may, it should seem, be inspected by every person who is interested in them[1](*b*). Copies from the books of *public offices* may

[92]

[1] Herbert *v.* Ashburner, 1 Wils. 297.

(*b*) In the cases cited, No. 1, leave was given to inspect the books of the quarter sessions, the court of conscience, and the commissioners of lieutenancy, as to proceedings against the party in the action; and where an action for false imprisonment, was brought against the informer, the justice of the peace, who convicted the plaintiff, was ordered to give a copy of the information (*Welch v. Richards*, Barnes, 468); but in *Groinwolt* v. *Burrel*, 1 Lord Raym. 252, and *Abeny* v. *Dickenson*, Say. 250, where actions were brought for false imprisonment in the execution of the sentence of the college of physicians in the one case; and of the order of the commissioners of hackney-coaches in the other; the court refused to grant rules for the plaintiff to inspect their books, on the ground that the persons in whose custody they were,

Ch. II. s. 3.

may also be called for by the persons interested, unless where public policy requires that the contents of them should not be disclosed [1]. Thus, access has been granted to the books of the commissioners for settling the debts of the army at the prayer of an officer's widow [2]; but refused to the books containing an account of the revenue, for the purpose of settling a mere idle wager as to the amount of the duties [3]. In like manner, the books and muniments of a *corporation* containing the rights of its members are open to all of them; and if, when a suit is depending, application be made to the person who has the custody of them, and he refuses an inspection, the court, in which it is so depending, will compel him to give it [4]. But when a dispute takes place between the corporation and an individual, who is no member of it, as when a corporation sues a stranger for tolls [5], the corporation being as to him the same as a private person, a court of justice will not grant an inspection of the books in order to enable the party to find evidence against the body with whom he is contending; any more than they would to inspect private title deeds, if the dispute existed between two individuals.

[1] Wilson *v.* Rogers, 2 Stra. 1242. Edwards *v.* Vesey, Cas. temp. Hardw. 128.

[2] Moody *v.* Thurston, 1 Stra. 304.

[3] Atherfold *v.* Beard, 2 T. Rep. 616.

[93]

[4] Rex *v.* Hollister, Cas. temp. Hardw. 245. Rex *v.* Fraternity of Hostmen in Newcastle upon Tyne, 2 Str. 1223.

[5] Mayor of Southampton *v.* Graves, 8 T. Rep. 590.

The same principle applies to the *court rolls* of a manor; as between the lord and the tenants, or between the tenants themselves, they ascertain the rights of the respective parties, and are therefore open to all; so that if a lord claim an amercement [6], or two tenants are disputing about the custom of a manor [7], the tenant has, in either case, a right to inspect, and use as evidence, the rolls relating to his title; and, if the lord refuse the inspection, the court

[6] Baldwyn *v.* Trudge, Barnes, 237.

[7] Hobson *v.* Parker, Ibid.

were, were no parties to the suit. So where the president of a military court of inquiry was sued by an officer, on whose conduct he had made a report, as for a libel contained in such report; it was held that the report was a privileged communication, and could not be read in evidence either directly or by an office copy. *Horne* v. *Ld. C. F. Bentinck*, 2 Brod. & Bing. 180.

will

will make a rule on his steward for that purpose [1]; and every man who has a *prima facia* title to a copyhold, is entitled, though no cause be depending, to have such inspection [2]. But if the dispute be between the lord and a stranger, as if the lord plead a modus in a suit by the parson for tithes [3], or bring an ejectment for lands, claiming them as copyhold, when the defendant contends they are freehold [4]: or the lords of two neighbouring manors dispute about the boundaries [5], the lord is not obliged to produce, nor will a court of justice compel him to show the rolls of his manor; for in this case they are considered as mere private deeds in which the other persons have no property; and therefore if it be necessary to give them in evidence against him, the same previous steps must be taken, and the same evidence given as in all other cases of private deeds, in possession of the adversary, of which I shall have occasion to speak in the next section.

[1] Hobson *v.* Parker, Barnes, 237.

[2] Rex *v.* Lucas, 10 East, 235.

[3] Bishop of Hereford *v.* Duke of Bridgewater, Bunb. 269.

[94]

[4] Smith *v.* Davies, 1 Wils. 104. Vide 3 T. Rep. 151.

[5] Talbot *v.* Villeboys, cited 3 T. Rep. 142.

The several instances before mentioned, in which inspection of public books was granted, were cases in which the person applying was claiming or contesting a civil right; but in no case where a criminal prosecution has been commenced, will a court of justice compel the party against whom such prosecution is carried on, or a public body, of which he is a member, to grant such inspection; for this would, in effect, be obliging the person accused of a crime to furnish evidence against himself [6], which is contrary to one of the first and most humane maxims of the law of England; and therefore, when an information was filed against corporation justices for taking money to grant licences [7], and a similar prosecution commenced against the vice-chancellor of Oxford for misbehaviour in his office [8], the court refused to grant an inspection of the corporation books in the one case, and of the statutes of the university

[6] Vide 2 Stra. 1211; 1 Wils. 241. Regina *v.* Mead, 2 Lord Raym. 927.

[7] Rex *v.* Cornelius, 2 Stra. 1210.

[8] Rex *v.* Purnel, 1 Wils. 239, 1 Black. 37.

Ch. II. s. 3.

university in the other: so if an information be granted for bribery at an election [1], or against overseers for making an illegal rate, the court will not in either case grant a rule for the inspection of the corporation or parish books. And, in a late case, where *A.* had, by the authority of a parish vestry, made a report in writing respecting the conduct of *B.*, founded, as it was stated, on the inspection of certain documents then in the parish chest, but which had since got into the possession of *B.* who claimed to be vestry clerk, and *B.* brought an action against *A.* as for a libel contained in the report, the Court of King's Bench refused to compel *B.* to produce or permit *A.* to take copies of the documents so in his possession [2].

[1] Rex v. Heydon, 1. Black. 351.

[2] May v. Gwynne, 4 B. & A. 302.

But informations, in the nature of *quo warranto* [3], though in form criminal prosecutions, do not fall within the reason of the last class of cases, for they are in effect proceedings to ascertain civil rights; and therefore, when a rule has been obtained for an information, by a person who is a member of the corporation, it is considered as matter of course for the court to grant a rule to inspect the corporation books; but it has never been decided that a relator, who is a stranger to the corporation, shall have such inspection. Indeed it is hardly possible that the question should ever arise, for, unless the title of a person in possession of an office is objected to on some public ground which concerns the whole community, as for not having taken the sacrament, or some such general objection [4], the court will hardly ever disturb the peace of corporations by listening to the application of a mere stranger; and even when a member of the corporation is the relator, the inspection granted to him is confined to such documents as concern the point in dispute [5], within which limitation all inspection of public documents is confined [6].

[3] Rex v. Lee, there cited, and 1 Wils. 240.

[4] Rex v. Brown, 3 T. Rep. 574, note.

[5] Rex v. Babb, 3 T. Rep. 579.

[6] Benson v. Port, cited 1, Wils. 240, &c.

SECTION IV. [96]

Of Instruments of a private Nature.

Ch. II. s. 4. *Deeds, &c.*

We now proceed to the consideration of written evidence, of a very different description from that noticed in the preceding sections, viz. the mere private instruments of the parties, or of those through whom they claim. We have observed that documents of a public nature are, for the most part, confined to a particular spot, and liable to be called for by several persons at the same time; for which reason, and also on account of the authority which the law gives to acts done under its immediate sanction, courts of justice, in such cases, permit examined copies to be given in evidence. But of private deeds, 10 Co. 92. or other instruments, the production of the original (*c*), if in existence, and in the power of the party using

(*c*) It has been said that even the counterpart of a deed cannot be read in evidence, without some account of the original, (Salk. 287), and the general practice is to give notice to a tenant to produce the original lease, in an action by his landlord against him; but there can be no reason why the copy, or rather the duplicate of the deed executed by the party himself, should not be evidence of the whole contents of it *against him*; though if the demise came in question in an action against the lessor, or a third person, it certainly would not. In a late case, where a declaration for not stamping an indenture of apprenticeship, stated that *A.* put himself apprentice to the defendant, the part of the deed executed by him was held sufficient evidence, without production of or notice to produce the other part executed by *A.* *Burleigh* v. *Stibbs*, 5 T. Rep. 465. So in an ejectment by landlord against tenant, for a forfeiture, the lessor of the plaintiff proved the counterpart of the lease executed by the defendant; but having given no notice to produce the original, an objection was taken by the defendant's counsel, that the counterpart could not be read. *Lawrence*, J. ruled that it was sufficient, saying it was an acknowledgment by the defendant, under his hand and seal, that the lessor of the plaintiff had demised to him, and that he had become tenant under the terms mentioned in the counterpart. *Roe* dem. *West* v. *Davies*, Gloucester Spring Ass. 1806: and the court afterwards refused a new trial. 7 East, 363.

it,

Ch. II. s. 4. *Proof of Deeds, &c.*

[97]

it, is always required; till which done, no evidence whatever of the contents can be received: but where the original has been destroyed, or lost by accident [1], as where an original award was lost in a mail which was robbed [2]; or being in the hands of the adverse party, notice has been given him to produce it [3], then an examined copy, or even parol evidence of the contents, being the best evidence in the power of the party, is received; it being first proved, that the original, of which such secondary evidence is offered, was a genuine and valid instrument [4] (*d*), and that all due diligence has, in the case of a lost deed, been used to regain the possession of it. Proof by a witness who had the instrument, that it was thrown aside as of no further use, and therefore that he believes it to be lost, is sufficient [5]; for, as was observed in a late case, it is a very different thing whether the subject of inquiry be an useless paper, which it may reasonably be supposed to be lost, or whether it is an important document which the party might have an interest in keeping, and for the non-production of which no satisfactory reason is assigned [6]. So in a settlement case, where there was only one part of an indenture, an application to the apprentice, since deceased, and his declaration that he burnt it when the term expired, with an application to the executor of the master, and a declaration by him that he knew nothing about it [7]. But in a case where two parts of an indenture had been executed, and one part having been destroyed, application had been made to the party who had the other part, his declaration that

[1] Vide Read v. Brookman, 3 T. Rep. 151.

[2] Robinson v. Davies, 1 Stra. 526.

[3] Young v. Holmes, 1 Stra. 70.

[4] Goodier v. Lake, 1 Atk. 446.

[5] Rex v. Johnson, 7 East, 66; 8 East, 284. Vide Brunster v. Sewell, 3 M. & S. 296.

[6] Per Abbott, C. J. 3 Barn. & Ald. 298.

[7] Rex v. Inhabitants of Merton, 4 M. & S. 48.

(*d*) Where an instrument requiring a stamp is written on plain paper, and afterwards lost or destroyed, though by the adverse party, no evidence can be received of its contents. *Rippmer* v. *Wright*, 2 Barn. & Ald. 478. *Rex* v. *Castle Morton*, 3 Barn. & Ald. 588. But if the adverse party withhold it, the court will order him to produce it to be stamped. *Bateman* v. *Phillips*, 4 Taunt. 157.

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he could not find it, was considered as insufficient without calling him as a witness [1].

If the original instrument is supposed to be in the hands of a third person, he should be served with a *subpœna duces tecum* to produce it; and lest he should have delivered it to the adverse party before the service of the subpœna, it may be prudent also to give notice to the latter to produce it. But if, after service of the subpœna, the person in whose possession the instrument then was, deliver it to the other party for the purpose of avoiding the effect of the writ, this will not render it necessary to give him notice to produce it, but the party so calling for it may, in such case, give parol evidence of its contents.

[1] Rex v. Castleton, 6 T. Rep. 236.

Leeds v. Cooke and Wife, Appendix.

Subscribing Witnesses.

If there be a subscribing witness who is living, and in a situation to be examined, he is the only person competent to prove the execution, because he may know and be able to explain facts attending the transaction which are unknown to a stranger; and for this reason, it has been held that a confession or acknowledgment of the party to the deed, whether it is offered as evidence against him [2], or against a third person [3], will not excuse this testimony (*e*). This rule of evidence extends to all cases, whether

[98]

[2] Johnson v. Mason, 1 Esp. Ca. 89.

[3] Abbot v. Plumbe, Doug. 216. Laing v. Raine, 2 Bos. & Pul. 85.

(*e*) In the case of *Call* v. *Dunning*, 4 East, 53, the court held that even the admission of the execution of a bond in an answer to a bill in Chancery, filed for the express purpose of obtaining such admission, was not sufficient without evidence to account for the non-production of the subscribing witness. And where a notice to quit was served on a tenant, which notice was attested by a witness, it was also held that proof of the service on the tenant, and that he did not object, was not sufficient without calling the subscribing witness. *Doe* dem. *Sykes bart.* v. *Durnford*, 2 Maule & Selwyn, 62. But when a man on his examination before commissioners of bankruptcy produced a bill of sale from the bankrupt, and admitted the execution of it in his deposition, this was held sufficient evidence of it against him in an action of trover which the assignees afterwards brought to recover the goods taken under it. *Bowles* v. *Langworthy*, 5 T. Rep. 366. So if a man agree, pending a cause, to admit a deed on the trial, this also will dispense with the necessity of calling the subscribing witness. *Laing* v. *Raine*, 2 Bos. & Pul. 85.

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Ch. II. s. 4. *Subscribing Witnesses.*

the deed be an existing instrument or cancelled [1], and even if it be lost [2], and parol evidence given of its contents, the subscribing witness, if known, must be called; but if he is not known, any other person who has seen it, is a competent witness.

Subscribing witnesses are not however necessary to the validity of a deed [3], and therefore if there be none, or the subscribing witness being called, denies having seen the instrument executed [4] (*f*); or it appear that the name of a fictitious person has been put as a witness by the party himself who executed the deed [5]; or the person really attesting was at the time of the execution of the deed interested in it and continues so at the time of the trial [6], in these cases proof of the hand-writing of the party will be sufficient (*g*); and if the instrument, on the face of it, purport to be sealed and delivered, such proof alone is strong evidence for a jury to presume that the other formalities were complied with. It has, indeed, been said in one book of great authority [7],

[1] Bretton *v.* Cope, Peake N. P. 30.

[2] Keeling *v.* Ball, Appendix. 37 Geo. 3.

[3] Comyns's Dig. Fait, (B.) 4. Vide 1 Lev. 25.

[4] Grellier *v.* Neale, Peake N. P. 146. Doug. 216. Lowe *v.* Jolliffe, 1 Black. 365.

[5] Fasset *v.* Brown, Peake N. P. 23.

[6] Swire *v.* Bell, 5 T. Rep. 371.

[7] Gilb. Law Ev. 101. Bul. N. P. 254.

(*f*) It is not necessary that he should actually *see* the party execute; for, if he be in an adjoining room, and the party after executing the deed, bring it to him, tell him that he has done so, and desire him to subscribe his name as a witness, that is sufficient. *Park* v. *Mears*, 2 Bos. & Pul. 217. In *Phipps* v. *Packer*, 1 Campb. 412, Lord Ellenborough held that if the subscribing witness denied the execution, the party could not be permitted to give other evidence; but the case of *Grillier* v. *Neale* was not adverted to; and in two subsequent cases, viz. *Fitzgerald* v. *Elsee*, before *Lawrence*, J. and *Lemore* v. *Dears*, before *Le Blanc*, J. the same rule was adopted as that laid down by Lord *Kenyon*. *Vide* Campb. 635 and 636; and so the Court of Common Pleas also held in *Talbot* v. *Hodson*, 7 Taunt. 251.

(*g*) In *Cunliffe and wife*, administratrix, v. *Sefton*, 2 East, 183, there were two subscribing witnesses to a bond, one of whom was the administrator of the obligee and a plaintiff in the action; the plaintiff proved that diligent inquiry had been made after the other subscribing witness at the places of residence of the obligors and obligee, and that no account could be obtained of such a person, who he was, where he lived, or any circumstance relating to him: This was held sufficient to let in evidence of the hand-writing of the other subscribing witness, who was interested as plaintiff on the record.

and

and repeated in another of more modern date, that "though the deed be produced under hand and seal, "and the hand of the party be proved, yet that is no "full proof of the deed, for the delivery is necessary "to the essence of the deed, and there is no proof "of the delivery but by a witness who saw it;" but I conceive that the authority of this *dictum*, supposing it to extend to a case where there is no subscribing witness, is destroyed by the subsequent decisions. At the time when writing was but little practised among men, and when contracts were authenticated by seals only, it might be proper to insist on having some person who was present at the execution; for seals might be so easily counterfeited, or affixed by any person, that it was requisite courts of justice should be particularly careful in receiving evidence of them; but the characters of hand-writing are in general so distinguishable from each other, that they cannot easily be mistaken.

[100]

When the subscribing witness is dead, insane [1], or absent in a foreign country [2], at the time of the trial, whether for a permanent residence or temporary purpose [3] (*h*), or by the commission of some crime [4], or

[1] 12 Vin. Evidence, (T. b.) 48, pl. 12.

[2] Coghlan *v.* Williamson, Dougl. 93. Holmes *v.* Pontin, Peak. N. P. 99. Barnes *v.* Trompowsky, 7 T. Rep. 265. Adams *v.* Kerr, 1 Bos. & Pul. 360.

[3] Prince *v.* Blackburn, 2 East, 250.

[4] Jones *v.* Mason, 2 Stra. 833.

(*h*) Now by stat. 26 Geo. 3, c. 57, s. 58, deeds executed in the *East Indies*, and attested by persons resident there, may be proved by evidence of the hand-writing of the obligor and witnesses, and that the witnesses are resident there: and the like proof is made sufficient evidence in the *East Indies* of any deed executed in *Great Britain*. In *Crosby* v. *Percy*, 1 Taunt. 364, the Court of Com. Pleas went still further, and held that even where the witness had absconded to avoid his creditors, and could not after fair and diligent inquiry be found, the proof of his hand-writing was sufficient. *Mansfield*, C. J. said the law had been relaxed in the course of his practice, and the balance of convenience was in favour of the extension, and that more inconvenience resulted from excluding the secondary evidence than from admitting it; and the same rule was adopted by Lord *Ellenborough* in the case of *Wardel* v. *Fermor*, 2 Campb. 282, where the subscribing witness had absconded from a commission of bankruptcy taken out against him. So where a man was serving on board the navy, proof of his appearing by the Admiralty books to

Ch. II. s. 4. *Subscribing Witnesses.*

or the accrual of some interest[1], subsequent to the execution of the instrument, he has become an incompetent witness; proof of his hand-writing is the next best evidence which can be given. In the first case, viz. where he is dead, this alone has been held to be sufficient; but in the others, it has been usual, and in one case was held to be necessary (*i*), to prove the hand-writing of the party to the deed[2] also; and, in all these cases, a foundation must first be laid, by proving the situation in which the witness stands.

[1] Goss *v.* Tracy, 1 P. Wil. 289. Godfrey *v.* Norris, 1 Stra. 34.

[2] Vide Wallis *v.* Delancey, 7 T. Rep. 266. note (*c*). Gilb. Law Ev. 105.

to be on board a ship then at sea, and his mother also being called to prove his identity, was held sufficient to let in evidence of his hand-writing. *Parker* v. *Hoskins*, 2 Taunt. 223.

(*i*) In the case of *Adams* v. *Kerr*, 1 Bos. & Pul. 360, where a bond was executed abroad, one witness was dead, and the other resident abroad, proof of the hand-writing of the deceased witness was held sufficient, without proof of the hand-writing of the other, or the obligee. But in *Wallis* v. *Delancey*, where a bond was executed at *New York* in the presence of two witnesses, and the hand-writing of one who was abroad was proved, Lord *Kenyon* held that evidence should be given *of the hand-writing of the obligor also*, which was given accordingly; and it being objected that the hand-writing of *Morton*, the other subscribing witness, should be proved, and that he was abroad or dead, his lordship thought that some evidence of that sort was necessary. Whereupon the plaintiff proved that there had been a man of the name of *Morton* who had lived as clerk with the other subscribing witness, but his christian name, or hand-writing, or what was become of him, was not proved; and on objection that he might, for aught appearing to the contrary, be alive and in *England*, Lord *Kenyon* held the evidence to be sufficient, for this being a foreign transaction, though perhaps the evidence was capable of being more perfect, yet it was sufficient and reasonable evidence to go to the jury at least, unless rebutted by some evidence on the other side. But in *Cunliffe* v. *Sefton*, ante, 96, and *Prince* v. *Blackburn*, 2 East, 250, where the witness was abroad at the time of the trial, proof of the hand-writing of the witness interested in the one case, and absent in the other, was considered to be sufficient, and the plaintiff was not called upon to prove the hand-writing of the obligor; so that it seems the N. P. case of *Wallis* v. *Delancey*, and the act of parliament, as to proof of deeds executed in the *East Indies*, (which passed before it was clearly settled that the hand-writing of the subscribing witness might in such cases be proved,) are the only authorities which show that evidence of the hand-writing of the obligor is necessary.

It

It frequently happens, that there are more than one witness to a deed, and in the case of a will of lands, the statute of frauds expressly requires three witnesses; nevertheless, in these cases, it is sufficient if one be called; but if they are all dead, the deaths of all should be proved before evidence is received of the hand-writing of either, for until it appears that neither of them is living, the other is not the best evidence which the nature of the case will admit of.

[102]

But it may be asked, how is the hand-writing of a man to be proved, where no one saw him write his name to the instrument, which is to be produced in evidence? In this case it is plain that no positive or direct evidence of the fact can be given, and therefore the law still adhering to its general rule, that the best evidence *the nature of the case will admit of* is sufficient, is satisfied with circumstantial and presumptive evidence. The hand-writing of every man has something peculiar and distinct from that of every other man, and is easily known by those who have been accustomed to see it, and therefore the *belief* of such persons is always received as presumptive evidence of the fact, either in civil or criminal[1] cases. But the person who speaks to that belief, must have such a knowledge as enables him to form it, such as having seen the party write, or having received letters from him in a course of correspondence[2]; barely having seen letters purporting to be franked by him[3], or other papers, which he has no authentic information are of the party's hand-writing, is not sufficient.

[1] Dr. Hensey's case, 1 Burr. 642.

[103]

[2] Gould *v.* Jones, 1 Black. 384.

[3] Cary *v.* Pitt, esq. K. B. Sittings at Westm. after Easter Term, 37 Geo. 3. Append.

In forming this belief, the witness ought, in civil cases, to speak solely from the impression which the hand-writing itself makes upon his mind, without taking into his consideration any extrinsic circumstance; and, therefore, in a case[4] where a witness said that he should, looking at the hand-writing,

[4] Dacosta *v.* Pym. Append.

Ch. II. s. 4. *Proof of Hand-writing.*

think it was that of the party whose name it bore, but that from his knowledge of him he thought he could not have signed such a paper, it was held that this was *prima facie* evidence of the hand-writing; and on the same principle, where it was contended, that the paper produced was the forgery of a third person, evidence that such third person had forged the defendant's name to other instruments of a similar nature, was held not to be admissible[1] (*k*).

[1] Balcetti *v.* Serani, Peak. N. P. 142. Graft *v.* Lord Brownlow Bertie.

[104]

The process by which the mind arrives at the belief of hand-writing, being the recollection of the *general character* from an acquaintance, by frequently seeing it, and not from the formation of *particular letters*, or a single inspection, courts of justice have wisely rejected all evidence from mere *comparison of hands* unsupported by other circumstances; they will not, therefore, permit two papers, one of which is proved to be the hand-writing of a party, to be delivered to a jury for the purpose of comparing them together, and thence inferring that the other is also of his hand-writing. But in cases where the antiquity of the writing makes it impossible for any per-

Macferson *v.* Thoytes, Peak. N. P. 20. Brookhard *v.* Woodley, ib. note (*a*).

(*k*) *Graft* v. *Lord Brownlow Bertie*, administrator of Lady *Mary Greathead*, sittings at Westm. after Trin. 1777, MS. Debt on bond, plea *non est factum*. The bond was attested by *Dadley* only, and he being dead, his hand-writing proved. For the defendant, it was offered to prove, that *other bonds* attested by *Dadley* were forged, which bonds were produced; but Mr. *Dunning*, for the plaintiff, strongly objected to this evidence, because plaintiff could not be prepared to support the authority of other deeds. Lord *Mansfield*.—*Dadley*'s hand is proved as evidence of all he would have said if living, and if he had been here, they might have produced other bonds, and asked whether they were his signature, and whether he saw the bonds executed; and if he had said yes, they might have called other witnesses to prove that they were not given. Lord *Mansfield*, at last, rejected the evidence, with liberty for the defendant to move the court; but the jury, on evidence that was given, found a verdict for the defendant. *Quære*, Would not the proper evidence in this case have been the *general character of Dadley*; and that the persons acquainted with it would not have believed him on his oath? *Vide post*, [125].

son

son to prove it, from having actually seen the person write, and where the instrument acquires a degree of authority from the place in which it is found, the evidence of a man who has had opportunities of making himself acquainted with the *character*, by frequent inspection, has been admitted: and, therefore, where a parson's book was produced to prove a modus, he having been long dead, a witness who had examined the parish books, in which his name was written, was permitted to swear to the similitude; for it was the best evidence the thing was capable of. And in some later cases, ancient documents, coming out of the proper custody, have been inspected in court, for the purpose of showing that the paper in question is of the same hand-writing [1]. In one case the receipt of a former rector, dated forty years before, for a money payment in lieu of tithes, given to a person of the same name as the defendant, residing at the same place, and coming out of the custody of the defendant, was permitted to be read, though there was no distinct evidence of the hand-writing of the rector, of the degree of relationship between the defendant and the person to whom the receipt was given [2]; but, in another case, a paper writing, purporting to be a receipt of more than fifty years old, was by three barons (dissent. *Wood*) considered as inadmissible, until proof was given of the hand-writing, or of the death of the party, and the relative situation of the parties to the rector [3].

Per Hard. C. 6 Dec. 1746, Bul. N. P. [236.]

[1] Morewood *v.* Wood, cited 14 East, 327; and Roe dem. Brune *v.* Rawlins, 7 East, 279, and post, Appendix.

[2] Bertie *v.* Beaumont, 2 Price, 307.

[3] Manby *v.* Curtis, 1 Price, 225.

Where witnesses have been called to prove the similitude of hand-writing, and other witnesses have, from the same premises, drawn a different conclusion, it has in some cases, before a jury whose habits of life have accustomed them to the sight of hand-writing, been permitted to hand up other papers confessedly written by the party for them to inspect and compare them together; this mode of proceeding however,

Allesbrook *v.* Roach, K. B. Sittings at Westmin. after Trin. Tm. 1795. MS. 1 Esp. Cas. [105] 815; S. C. Da Costa *v.* Pym, Append.

Ch. II. s. 4. *Proof of Hand-writing.*

however, seems rather a departure from the strict rules of evidence, and before an illiterate jury would probably not be adopted.

Goodtitle dem. Revet *v.* Braham, 4 T. Rep. 497.

In one case which came before the court, the party who contended that the hand-writing was a forgery, was permitted, after a great deal of other evidence, to examine a clerk at the post-office, whose business it was to inspect franks and detect forgeries, to prove that from the appearance of the hand-writing, it was, in his opinion, a forgery, and not a genuine hand-writing; but, in a subsequent case, Lord *Kenyon* said that such evidence was wholly inadmissible; and observed, that though in *Revet* v. *Braham* it was admitted, yet that in his direction to the jury, he had laid no stress at all upon it.

Cary *v.* Pitt, supra.

The analogies of law, however, appear strongly to support the admissibility of this evidence; for opinion, founded on observation and experience, is received in most questions of a similar nature. There is a certain freedom of character in that which is original, which imitation seldom attains, and the want of that freedom is more likely to be detected by one whose attention has been directed to the subject, than by another who has never given his mind to such pursuits. It does, therefore, seem rather too much to say, that such evidence is in all cases inadmissible, though it certainly ought to be received with great caution, and meet with little attention, unless as corroborating other and stronger evidence.

[106]

Rex. *v.* Cator, 4 Esp. Cas. 117.

The true distinction seems to have been taken by Mr. Baron *Hotham*, on the trial of the *King* v. *Cator*, where the defendant being indicted for publishing a written libel, and a person from the post-office who had never seen him write, being called as a witness, that learned judge permitted the witness to give *general evidence*, that the writing appeared to be in a feigned hand; but when the witness was asked, whether,

whether, on comparing such hand-writing with papers proved by others to be the genuine hand-writing of the defendant, he could say it was the disguised hand of the same person, his lordship rejected the evidence attempted to be introduced by such examination; because it arose only from comparison of hands. We may therefore, I think, still consider the case of *Revet* v. *Braham*, as an existing authority to show, that for the purpose of proving generally and in the abstract, that a hand-writing is *not genuine*, such evidence is *admissible*, though, as I said before, deserving of little attention; for the want of freedom in the hand-writing, and the painting of the letters, as it was called by the witness in that case, may arise from the infirmity [107] of the writer, his not having formed a fixed character; or many other causes which a person, unacquainted with the genuine hand-writing, cannot take into his consideration. A tradesman who is daily making entries in his books, will acquire a more free and steady character, than an illiterate person who can but just write his name; and a man, whose habits of life lead him to write much oftener and with less care, will get still more of a peculiar *character* in his hand-writing; all which circumstances should certainly be taken into the consideration of a jury before they give weight to such evidence.

Of Notice to produce Writings.

In the beginning of the present section, I had occasion to observe, that where an original instrument was in the hands of the party, against whom it was intended to be given in evidence, no evidence whatever of its contents could be received, until notice had been given to produce it. This notice may be delivered either to the party or his attorney, even in an information or penal action[1]. And if a lessee give a formal notice to his lessor of his intention to do any act according to the terms of the lease,

[1] Attorney General *v.* Le Merchant, 2 T. Rep. 201, note (*a*). Cates *v* Winter, 3 T. Rep. 306.

Ch. II. s. 4. *Of Notice to produce writings.*

lease, and the lessor afterwards assign the reversion, it is sufficient, when a dispute arises between the lessor and the assignee of the reversion, to give notice to the latter to produce such formal notice, without applying to the original lessor, for it will be presumed that he delivered it to his assignee as a document relating to the estate [1].

[1] Goodtitle dem. Luxmore v. Saville, 16 East, 87.

A letter informing a man of the dishonour of a bill, or the like, cannot be proved until a similar notice has been given [2]. This rule is founded on the wisest principles of justice, for the party in whose hands the papers were, not deeming them necessary for his own case, might not otherwise bring them with him; but the rule being adopted for the purpose of preventing a misrepresentation of any of the facts which form the foundation of the action, it follows that any written paper delivered to a party after it is commenced, or for the mere purpose of a formal notice previous to its commencement, and of which a copy is kept is not within it; it being a general rule that no notice is necessary to produce another notice, otherwise it might be extended *ad infinitum*; and, indeed, in the cases of notices given to a tenant to quit, to a magistrate, previous to the commencement of an action against him, a demand in writing of a warrant, made previous to the commencement of an action against an officer, or the like, where a copy signed by the same person who signed that delivered to the party is kept by a witness, each copy is considered as a duplicate original. The case of an attorney's bill, delivered under the statute, is similar in principle, and may, where a duplicate has been kept, be proved in like manner without notice to produce that delivered. In one case indeed, where trover was brought for a bill of exchange, it was held by Lord *Kenyon*, that notice must be given to produce the original, before evidence

[108]

[2] Shaw v. Markham, Peake's N. P. 165. Langdon v. Hull, 5 Esp. Cas. 156, accord.

Jory v. Orchard, 2 Bos. & Pull. 39.

Anderson v. May, Ibid. 237.

Cowen v. Abrahams, 1 Esp. N. P. Cas. 50.

dence of its contents was admissible; but this has since been properly overruled, as the form of the action itself gives the defendant sufficient notice to be prepared to produce the instrument [1].

It has been held in several cases [2], that if the party to whom notice has been given to produce an instrument, produce it accordingly, the other party is entitled to read it, without further evidence of its execution. As against the party to it, there seems to be no great objection to this rule; for he must know whether he ever executed such an instrument or not, and the plaintiff not knowing who were the subscribing witnesses, cannot come prepared to prove the execution. In one case, this rule was extended to third persons, into whose hands a deed had been delivered; and it was held, that an indenture of apprenticeship having come into the hands of the officers of a parish who were no parties to it, and they producing it under a notice, that no evidence was necessary to prove the execution; but the propriety of this decision has been doubted by very high authority. For in a subsequent case, where a similar point came before the court, Lord *Kenyon* said it was too important a question to be discussed in a session's case, where the opinion of a court of error could not be taken, and that nothing but a solemn judgment of the House of Lords should ever persuade him that this decision was right.

Another case afterwards occurred, in which the rule was denied altogether; and the plaintiff having, in consequence of notice from the defendant, produced a deed to which he was himself a party, whereby it would have appeared he had no interest in the insurance which formed the subject of that cause; and it appearing, on inspection of the deed, that there were subscribing witnesses to it, the defendant

[1] Bucher *v.* Jarret, 3 Bos. & Pull. 143. How *v.* Hall, 14 East, 274.

[109]

[2] Thompson *v.* Jones, cited 2 T. Rep. 43. Passel *v.* Godsall, Ibid. 44. Vide 2 T. Rep. 43.

Rex *v.* Inhabitants of Middlezoy, 2 T. Rep. 41.

Rex *v.* Inhabitants of Dolton, Mich. 41 Geo. 3.

Gordon *v.* Secretan, 8 East, 548.

Ch. II. s. 4.
Presumption of Instruments produced under Notice.

defendant was not permitted to read it, though he had no previous knowledge who the subscribing witnesses were; but in a still later case the general doctrine laid down in this case was in some measure restrained, and the plaintiff having, under notice from the defendant, produced the conveyance to himself of the estate of which he contended the land in dispute was a parcel, and to which deed he was an executing party, it was held that it was not necessary for the defendant to call the subscribing witness. In cases of this description, a judge would probably make an order for an inspection of the deed, to give the defendant an opportunity of informing himself whether there were subscribing witnesses or not.

Pearce *v.* Hooper, 3 Taunt. 62.

Presumption of Instruments from length of Time.

There are some instances in which the law permits instruments to be read in evidence without proof of the execution. In most cases it would be absolutely impossible, after a great length of time, to prove the execution of a deed, or even the hand-writing of the parties. It is necessary that a period of limitation should be fixed, otherwise new questions would daily arise, and therefore courts of justice have laid it down as a rule, that a deed of above *thirty* years standing, requires no further proof of its execution than the bare production, provided the possession has been according to the provisions of the deed, and there is no apparent erasure, or alteration on the face of it; and livery of seisin, though not endorsed on a feoffment, will, after such a lapse of time, be also presumed [1]. In like manner, if a bond of that date be found amongst the papers of an intestate [2], or public company [3], the same presumption arises in its favour from the place where it was found (*l*). But

[1] Bul. N. P. 255.

Ibid. 256.

[110] Vide 12 Vin. Abr. Evid. pl. 11, where presumed after 25 years.

[2] Forbes, Ad. *v.* Whale, Guildhall, Sitt. after Mich. T. 1764.

[3] Governor & Co. of Chelsea Water Works, *v.* Cowper, K. B. Sitts. after Hil. Tm. 1795. 1 Esp. 275, S. C.

(*l*) In *Rex* v. *Inhabitants of Ryton*, 5 T. Rep. 259, it was held, that the production of a parish certificate thirty years old, was sufficient,

Ch. II. s. 4. *Presumption of Instruments from length of Time.*

But as this rule is founded on presumption, it does not apply to cases where there are circumstances to raise a contrary presumption[1], as if the possession has been contrary to the deed, or if the deed appear on the face of it to be razed or interlined, or a man convey a reversion, first to one, and then by a subsequent deed convey it to another, and the second purchaser prove his title; in all these cases it will be incumbent on the party to give the ordinary evidence of the execution of his deed, for the presumption from the antiquity of the deed is destroyed by the opposite presumption; in the one case, that some unfair alteration has been made in the deed; in the other, that the person having the possession had also a legal right; for the law will not raise a presumption that a man would be guilty of so manifest a fraud, as to convey the same estate to two different people.

[1] Chattle *v.* Pound, 1701, Gilb. Law Ev. 103. See also Doe dem. Howell *v.* Lloyd, Append.

[111] *Presumption of Deeds recited in others.*

Another instance in which a deed is, according to some cases, considered as proved without calling witnesses, is where one deed recites another; in this case, the recital, it has been said, is sufficient evidence of the recited deed, against the party to that wherein it is recited, or against any one claiming under him; but against a stranger to it, evidence of the actual execution of the first deed must be given, for the admission of another person cannot affect him, and if such evidence were to be admitted, deeds might easily be fabricated by false recitals. But though, in the above cases, it is laid down in general terms, that as against the party to the reciting deed, such deed is evidence of that recited in it, yet there are others in which this seems to have been consi-

Ford *v.* Grey, 1 Salk. 286. Fitzgerald *v.* Eustace, Gilb. Law Ev. 100.

Vide Hardr. 120. Cragg *v.* Norfolk, 2 Lev. 108. See also Ford *v.* Grey, 6 Mod. 45.

sufficient, without evidence of the place where it came from; but the common practice is for the attorney to be called, to say that he had it from the title deeds of his client or elsewhere, to show that it came from the proper depositary. *Vide ante*, 86. 101.

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Ch. II. s. 4.

Presumption of Deeds recited in others.

dered as secondary evidence, and admissible only when the first deed was shown to be lost, or some other reason given for not producing the regular and best evidence of it. Such is now the general received opinion of the profession, and we find by a case which I have had occasion to cite in a former page, that even an admission of a deed on oath will not prevent the necessity of giving regular evidence of its execution.

Ante, 95.

Proof of Deeds by Enrolment.

Something similar to the case of a recital is that of an enrolled deed under the stat. Hen. 8. It has been supposed by some, that when a deed, requiring enrolment by that statute, has been so enrolled, the bare proof of a copy from the enrolment would, in all cases, be sufficient evidence of its contents; and the case of *Smartle* v. *Williams*[1], warrants that supposition. But no other case goes to that extent, and the subsequent statute[2] does not appear to put that construction on the statute of enrolments. By that statute[3], " for supplying a failure in pleading or deriving title to lands, tenements, or hereditaments, conveyed by deeds of bargain and sale indented and enrolled, according to the statute Henry 8, *where the original indentures* of bargain and sale to be showed forth or produced *are wanting*, which (it is recited) often happens, especially where divers lands, &c. are comprised in the same indenture, and afterwards derived to different persons, it is enacted, that where in any declaration, avowry, bar replication, or other pleading whatsoever, any such indenture of bargain and sale enrolled shall be pleaded with a *profert in curia*, or offer to produce the same, the person or persons so pleading shall and may produce and show forth, and be suffered and allowed to produce and show forth, by the authority of this act, to answer such profert, as well against her majesty, her heirs and successors,

[1] 1 Salk. 280.

[2] 10 Anne, c. 18.

[3] Sect. 3.

as

as against any other person or persons, a copy of the enrolment of such bargain and sale; and such copy examined with the enrolment, and signed by the proper officer having the custody of such enrolment, and proved on oath to be a true copy so examined and signed, shall be of the same force and effect, to all intents and constructions of law, as the said indentures of bargain and sale were and should be of if the same were in such case produced and shown forth (*m*)." I think it is plain, from the whole of this statute, that it was intended to let in secondary evidence when the deed was in fact lost. The party was still compelled to make his profert, for the present practice of pleading a lost deed, was not then considered as admissible; and, that he might not be fettered by the form of his pleading, a statute was made to render the secondary evidence sufficient. It should therefore seem, that in this, as in all other cases, some evidence should be given of the inability to bring forward the best evidence, before that which is secondary is admitted. Lord Chief Baron *Gilbert* certainly did consider the enrolment to be evidence, without any qualification [2]; but this was so ably controverted by Mr. Justice *Buller* [3], and appeared to be so generally understood as the practice, that I did not think it necessary, in any former edition, to do more than to notice it as a mode of proof when the deed was lost [4]; but Mr. *Phillips* having [5] considered it as evidence in all cases, I have added this observation.

[2] Gilb. Law Ev. 86.

[3] Nisi Prius, 256.

[4] Vide Ante, 35.

[5] 2d Ed. 355.

The foregoing observations have been confined to the evidence required to prove the existence of deeds and their due execution, it remains to add a few observations on their admissibility in evidence

Effects of Deeds, and against whom Evidence.

(*m*) Proceeding on the same principle, the stat. 8 Geo. 2, c. 22, providing for the registry of deeds in the North Riding of Yorkshire, makes the enrolment evidence in case of loss by fire, &c.

when

Ch. II. s. 4. *Effect of Deeds, and against whom Evidence.*

when proved. A party is always bound by his own deed; and where a person is clearly entitled to an estate, any conveyance or charge by him is evidence against a stranger. But as a general rule it may be taken, that when the title is in dispute, one party cannot merely, by becoming a party to a deed, make evidence for himself or his descendants. If, indeed, a third person were to take a lease, and have possession, and pay rent under it, the possession and payment of rent would be evidence of themselves of title in the lessor; and so fortified, the lease would be a strong act of ownership [1]: and where a number of counterparts of leases have been found amongst the muniments of the lessor, of so very remote a date as to preclude all evidence of actual possession, they have been received as evidence of his right; as have ancient entries on the rolls of a manor of licences, by the lord, to persons to fish within certain districts, as evidence of his exclusive right of fishing within them [2]. But this evidence, though admissible, is so weak as to be entitled to no weight, unless acts of ownership are proved within more recent times.

[1] Clarkson v. Woodhouse, 5 T. Rep. 412.

[2] Rogers v. Allen, 1 Camp. 309.

SECTION V.

[112] *Of Evidence to explain written Instruments.*

Ch. II. s. 5.

A DEED, or other instrument, being produced and proved, is conclusive upon the rights of the parties, and no parol evidence can be received to contradict it, so as to enlarge or narrow its operation. Thus, if there be a release of all demands, without any recital to restrain its general operation, it cannot be shown by parol evidence that a particular sum of money

5 Co. 26, a. Payler v. Homersham, 4 M. & S. 423. Butcher v. Butcher, 1 N. Rep. 113.

money was intended to be excepted out of it (*n*); nor, if it is so restrained, can parol evidence be received to give it a larger and more extensive effect. So where an auctioneer put up a copyhold estate for sale by auction, which in the conditions for sale was stated to be free from incumbrances, and it afterwards turned out that there was a charge affecting the estate, on which account the purchaser refused to complete his contract; it was not permitted to the seller to prove that the auctioneer, at the time of the sale, had given public notice of the incumbrance [1]. In like manner, where printed conditions of sale of timber, growing on a certain close, omitted to state any thing of the quantity, parol evidence that the auctioneer, at the time of the sale, warranted a certain quantity, is not admissible [2]. So where a bond is conditioned for the performance of certain acts, the condition is conclusive on the parties, and cannot be controlled by any parol evidence that the agreement was otherwise [3], nor is such evidence admissible, unless for the purpose of showing that the instrument is void altogether, as being obtained by fraud or misrepresentation. So where a promissory note is made payable on de-

[1] Gunnis *v.* Erhart, 2 H. Black. 289.

[2] Powell *v.* Edmunds, 12 East, 6.

[3] Buckler *v.* Millerd, 2 Vent. 107.

(*n*) Where there was a reference of all matters in difference, and the arbitrators made an award as to all matters which the parties brought before them; it was held, that this did not preclude them from showing that there were other matters which had not been disputed before the arbitrators. *Ravee* v. *Farmer*, 4 T. Rep. 146. But in a subsequent case, where one party contended that he was entitled to a deduction arising out of the very transaction, the Court of King's Bench held he could not claim it afterwards, though he did not submit it to the arbitrator at the time. *Smith* v. *Johnson*, 15 East, 213. We had before occasion to notice the like decision, as in *Ravee* v. *Farmer*, in the case of a judgment, where the plaintiff had not given the whole of his demand in evidence before the jury. *Vide ante*, 36. Another exception to this rule is the *date* of the deed, which is never conclusive as to the time of *delivery*, from which alone the deed takes its operation; for it is open to the party in all cases to show, that the deed was executed on a day different from that whereon it appears to bear date. Shep. Touch. 72. *Hall* v. *Casenove*, 4 East, 477.

mand,

Ch. II. s. 5.
Explanation of Ambiguities.

mand, evidence cannot be admitted to show that it was not to be paid till after the death of the maker [1]. But if an ambiguity arise, it may be explained by evidence, though, in this case, a distinction has been made between what is called *a latent ambiguity*, and that which is not so. The *latent ambiguity* is that which does not appear on the face of the instrument, where every thing seems right and clear, but the meaning being rendered uncertain, by the proof of some fact, the law permits the removal of the doubt by the like evidence.

[1] Woodbridge v. Spooner, 3 Barn. & Ald. 233.

And, therefore, where a testatrix devised her estate to her cousin, *John Cluer*, there being both father and son of that name, parol evidence was admitted to show that the son was the person meant [2]; and where a devise was made to one by the name of *Mary*, whose name was *Elizabeth* [3], this also was permitted to be cleared up by parol evidence (*o*); for

[2] Jones v. Newman, 1 Black. 60. Cheny's case, 5 Co. 68. S. P.

[3] Doe dem. Cooke v. Danvers, 7 East, 299.

(*o*) *Thomas* dem. *Evans* v. *Thomas*, 6 T. Rep. 671. The testator, after several devises, proceeded thus: Item, I give to my four daughters, *Margaret*, *Anne*, *Mary*, and *Elizabeth*, one shilling each: item, I give to my three grand-children of *Llanteway*, *Anne*, *Elizabeth*, and *Elinor*, 40*l.* each: item, I give to my grand-daughter, *Elinor Evans*, of *Merthyr* parish, 40*l.*: item, I devise to my GRAND-DAUGHTER, *Mary Thomas*, of LLECHLLOYD IN MERTHYR PARISH, the reversion of the house in *Water-street*, &c. At the time of his death, the devisor had a grand-daughter named *Elinor Evans*, who lived in LLECHLLOYD in *Merthyr* parish, and a great-grand-daughter, *Mary Thomas*, an infant of about the age of two years, the grand-daughter of his eldest daughter, *Margaret*, by her second husband, *John Thomas*, being the only person of that name in the family; but it appeared that she lived at *Greencastle*, in the parish of *Llangain*, some miles from *Merthyr* parish, in which latter parish she had never been in her life. At the trial, the plaintiff's counsel proposed giving parol evidence, to show a mistake in the name of the devisee, that, when the will was read over to the devisor by a Mr. *Phillips*, who drew it, and who is since dead, the devisor said that there was a mistake in the name of the woman to whom the house was given; that *Phillips* then said he would rectify it, but the devisor answered there was no occasion, as the place of abode and the parish would be sufficient. To this evidence the defendant's counsel objected, contending, that there was not that *ambiguitas latens* which authorized the receiving of parol

for in all these cases, the heir's objection arose from parol evidence, and therefore parol evidence ought to be received to answer it. So if a man having two manors called *Dale*, levy a fine of the manor of *Dale*[1], without further description, circumstances may be given in evidence to prove which manor

[1] Roll. Abr. 676.

parol evidence. But *Lawrence*, J. received it, subject to the opinion of the court, as to its admissibility, in case the jury should be of opinion that the name *Mary Thomas* had by mistake been inserted instead of *Elinor Evans*; but the jury being of opinion that there was no such mistake, they were directed to find for the defendant on the first count, which they accordingly did, and consequently any further consideration on this point became unnecessary. The defendant's counsel then offered evidence of the declarations, made by the devisor at other times previous to the making his will, expressive of his regard for his great-grand-daughter, and of his intention of giving her the premises in question. This evidence was rejected by the learned judge, who thought that nothing *dehors* the will could be received to show the intention of the devisor, which could only be collected from the words of the will itself, after the removal of any latent ambiguity there might be in the description of persons, or other terms made use of in the will; and the jury, under his direction, found for the plaintiff in the several counts on the demises of the heirs at law, on the ground that the devise was void for uncertainty giving the defendant leave to move to enter a nonsuit. A motion was made accordingly, but the rule discharged, on the ground that the parol evidence which was properly admitted, raised the uncertainty, and that that uncertainty could not be removed by declarations made by the testator long before the making the will. But Lord *Kenyon* there said, that had these declarations been made at the time of making the will, he should have thought they ought to have been received in evidence. So where a testator after several remainders devised to *G. H.* eldest son of *A.* and his children, in strict settlement, and in default of issue of the children of *J. H.* to the third son of *A.* with the like limitations, parol evidence was admitted of the state and circumstances of the testator's family, and it was held, that upon such evidence being given, it became a question of fact for the jury, whether the mistake was in the name or the description? *Doe* d. *Chevalier* v. *Hultwaite*, 3 Barn. & Ald. 632.

In *Lord Walpole* v. *the Earl of Cholmondeley*, 7 T. Rep. 138, the testator had made a will in 1752, and another in 1756, without disposing of his personalty: By a codicil, (reciting that by his *last will dated in* 1752 he had made no disposition of his personalty,) he disposed thereof, and appointed executors; it was ruled that there was no such latent ambiguity as to let in parol evidence to show that the testator intended by the codicil to confirm the will of 1756, and not to republish that in 1752; and that will was therefore determined to be a subsisting will at the time of his death.

Ch. II. s. 5. *Ambiguities, latent.*

was intended, for this is not to contradict the record, but to support it[1]. And, in like manner, where a man having a house in London, and also wine vaults under a yard belonging to it, which wine vaults were in the occupation of *B.* and held as a distinct tenement, demised part of the house and the yard, by the description of "one room on the ground floor, and a cellar thereunder, and a vault contiguous and adjoining thereto, together with the ground whereon the same now stand, and together with a piece of ground on the north side (being the yard) in the occupation of *A.*" he was not estopped by the deed from showing that the vaults under the yard were a distinct tenement, and not included in the deed, though *prima facie* the property in the vault would pass by such a demise.

[1] Doe dem. Freeland *v.* Burt, 1 T. Rep. 701.

In the cases cited above, of two estates or two persons of the same name, or a mistake in the name of the devisee, we may observe that the words used in the instrument were clear in themselves, but that the extrinsic circumstances introduced by evidence rendered the meaning so uncertain, as to deprive the instrument of any operation whatever, and therefore further evidence was admitted for the purpose of preventing it from being wholly inoperative. But where the extrinsic circumstances do not go to that extent, and there is, notwithstanding, the doubt they create a sufficient estate to satisfy the words of the instrument according to one meaning of the description, collateral evidence is not admissible to show that the grantor or testator meant to use the description in a more extended sense. Lord *Bacon* commenting on the maxim "*Non accipi debent verba in demonstrationem falsam quæ competunt in limitationem veram*," says, "If I have some land wherein all these demonstrations are true, and some wherein part are true and part false, then shall they be intended

Bacon's Maxims, 77.

Ch. II. s. 5. *Ambiguities, latent.*

tended words of true limitation to pass only those lands wherein all the circumstances are true." Several cases, some in ancient times and others of more recent date, have occurred on this point; and as the latter have undergone much discussion, I shall only refer to them. In one[1] a testator devised his "estate at Leeshill, in the county of Wilts, and Hearne and Buckland, in the county of Kent." At the time of making his will he had lands in Hearne and other parishes in Kent, which he had purchased at the same time. It was proposed on the part of the devisee to prove that the testator used to call all the land by the general description of his Hearne Estate, and that he had sold Buckland before his death, and this for the purpose of showing that he meant the lands in the other parishes to pass. The Court of Common Pleas was divided on the question, Whether this evidence was admissible? but, on a writ of error, the House of Lords decided it was not. In a subsequent case[2], the testator devised his "estate of Ashton," and it being proved that he having a maternal estate, comprehending a manor, capital farm, and lands in that parish, and several other estates; some in the adjacent parishes, and some ten and fifteen miles distant, evidence was offered to prove that he was accustomed to call all his maternal estate by the general description of his "Ashton Estate," for the purpose of raising an inference that he meant to devise the whole by that name; but, on solemn argument, it was held, that this evidence was inadmissible. Again[3], where the testator devised "all the estate and interest which he had or could claim either in possession or reversion of or in any lands, tenements or hereditaments *at* Coscomb; it was holden, that evidence was not admissible to show that another estate, not *at* Coscomb, was formerly united, and had been ever since enjoyed with the estate at Coscomb, for the

[1] Whitehead v. May, 2 Bos. & Pul. 593.

[2] Doe dem. Chichester v. Oxendon, 3 Taunt. 147.

[3] Doe dem. Browne v. Greening, 3 Mau. & Sel. 175.

Ch. II. s. 5. *Ambiguities, latent.*

purpose of proving that such estate passed under the devise. In another case[1], a person being seised of a messuage and lands in a parish, and of a messuage and lands in the hamlets of *B.* and *C.* in the same parish, which he had purchased of *A.* let the whole to a tenant at one entire rent; and having other lands allotted to him under an inclosure act, in lieu of all other lands, except two acres and a messuage, which remained as before, all which the tenant continued to hold at the same rent, devised "all his messuage, farm, lands and premises, with the appurtenances, situate in the hamlet of *B.* which he had lately purchased of *A*;" and in this instance also the court held that the lands in the hamlet of *C.* did not pass, and that evidence *dehors* the will (viz. a notice to quit, describing all the premises as in *C.*) to show that he intended to pass all the lands which he purchased of *A.* was inadmissible. Again[2], where a testator devised to his wife all his wines for housekeeping, *in addition* to the settlement he made her upon his *copyhold* estate; and to *A.* the rents and profits of his new inclosed *freehold* cow pasture close, in North Collingham, during his life; and then to two nephews all his personal estate, to be divided, &c.; and after the decease of his wife he devised to the same two nephews all his furniture, plate, &c. and all his *copyhold* estate in North and South Collingham, and all other his personal estate, to sell and divide among his nephews and nieces;" in this case also the court held, that extrinsic evidence could not be received; that the settlement on the wife included a certain *freehold* close mistakenly there enumerated as one of several *copyhold* closes settled, the bounds of which were no longer distinguishable from those of the freehold, for the purpose of showing, that by the devise of all his *copyhold* estate, after his wife's decease, the *freehold* close in question passed as part

[1] Doe dem. Tyrell *v.* Lyford, 4 M. & S. 550.

[2] Doe dem. Brand *v.* Brown, 11 East, 441.

Ch. II. s. 5. *Ambiguities, latent.*

part of the real estate in settlement on his wife. The court also held, that as the settlement was not evidence, so neither were other instruments and papers not referred to in the will; as 1st, a bond of the same date as the settlement, and in aid of it, speaking only of copyhold to be settled; 2dly, the rough draft of the settlement altered by the testator; 3dly, a book endorsed "Collingham Estate Survey," kept with the muniments of his property, and including the freehold in question, without distinguishing it from the copyhold closes; and 4thly, a rental kept in the same place, on which was endorsed by the testator, that all the rents of the copyhold lands in North and South Collingham, were settled on his wife for life. The reason assigned for this last decision was, that there was no ambiguity on the face of the will, the testator having estates in North and South Collingham, to answer the description in it; nor was there any reference from the devise in question to the settlement, but by connecting it with the antecedent devise to the wife, and there was no such necessary connection.

There is another class of cases which must be distinguished from the preceding, not so much on the subject of admissibility of evidence, as on the construction of the instrument itself. The cases last cited are those where there was one description of the thing granted or devised, which it was necessary to take altogether for the purpose of its construction. Those now under consideration are, where there is a sufficiently clear description at first, but some unnecessary words are afterwards added. The distinction which has been made between these two descriptions of cases is this, viz. "where the grant is in *general terms*, the addition of a particular circumstance will operate by way of restriction and modification, but where there is a grant of a *particular thing* once sufficiently ascertained by some circumstance be-

Ch. II. s. 5. *Ambiguities, latent.*

longing to it, the addition of an allegation mistaken or false respecting it, will not frustrate the grant[1];" or, as it has been rather more quaintly, though not less intelligibly, expressed, that "the sentence being perfect before, the subsequent words shall be taken as words of suggestion and affirmation, and not of restriction or limitation[2]." Thus, where a grant was made of all tithes belonging or appertaining to the grantor within a particular parish, and then followed "all which were lately in the possession of Margaret Peto, widow, deceased;" all the tithes within the rectory were holden to pass, though none of them had been in the possession of Margaret Peto[3]. So where a testator devised all his farm called Trogues Farm, in the occupation of *A. C.*; and it appeared that only part of the land so called was in such occupation, it was holden that the rest of the land passed; and evidence was admitted of a notice to quit, given to a third person, who held part of the lands, of which the lands so holden were described as part of and belonging to Trogues Farm[4]. In another case[5] the testator devised all her "Britton Ferry estate," and all the manors, &c. thereto belonging, and of which the same consisted with the appurtenances; and afterwards devised to another person another estate, adding, "which as well as my Britton Ferry estate, is situate in the county of *G.*;" and the court held, that the latter words did not restrain the former general devise of the Britton Ferry estate, but that all land known by that description passed, though locally situate in another county. In this latter case it was strongly contended, that even without the subsequent words, "in the county of *G.*" the words "Britton Ferry estate" necessarily confined the devise to such land, as was within the parish of Britton Ferry, and were in effect the same as "my estate of Ashton," which was the expression in *Chichester* v. *Oxendon*; but the court held otherwise, saying, that the

[1] Roe dem. Connolly *v.* Vernon, 5 East, 51.

[2] 2 Roll. Abr. 52, pl. 26.

[3] Vicars Choral of Litchfield *v.* Ayres and others, Ibid. Sir T. Jones, 455.

[4] Goodtitle dem. Radford *v.* Southern, 1 M. & S. 299.

[5] Doe dem. Beach *v.* Lord Jersey, 1 Barn. & Ald. 550.

Ante, 115.

Ch. II. s. 5. *Evidence to rebut Presumptions.*

the words "Britton Ferry estate," was a description by *name*, whereas the words "estate of Ashton" was description by *place*.

By the established rules of all courts, whether of legal or equitable jurisdiction, some facts are presumed, though not expressly proved; but as such presumptions only prevail, when there is no evidence to rebut them, we have before seen that very slight evidence will be sufficient for that purpose; and though these presumptions arise from the usual construction of a deed, or other written instrument, yet evidence will be received for the purpose of showing that the general presumption is not applicable in the particular instance. Therefore where *A.* devised 400*l.* to his wife, and made her executrix without disposing of the surplus, Lord Chancellor *Hardwicke* admitted parol evidence to show that the intention of the testator was, that his wife should have it; for there was no ambiguity in the will, nor was it to alter the apparent intention of the testator. By law she was entitled to the surplus as executrix, and therefore the evidence was admitted only to rebut the rule of equity, which, in such cases, divides the residue amongst the next of kin, contrary to the general rule of law. But in *Brown* v. *Selwyn*, the testator having expressly devised the residue to both his executors, one of whom owed him money on a bond, parol evidence that the testator meant to extinguish the bond debt was rejected, because that would have been to have altered the apparent intent, and not simply to have rebutted an equity.

Lake *v.* Lake, Bul. N. P. 297.

Cas. Temp. Talb. 240. S. C.

In like manner, when a man levies of fine, and no deed is made to declare the use, the law presumes that he did it only to secure his estate, and it enures to his own use; but parol evidence has been admitted to rebut this presumption, and vest the estate in the cousee; though by the statute of frauds uses to third

Altham *v.* Earl of Anglesen, Gilb. Cas. 16. Roe *v.* Popham, Dougl. 25.

Ch. II. s. 5. *Ambiguities, patent.*

[114]

third persons must be declared by writing, signed by the party. So where a man makes his will, and afterwards marries and has a child, the law *presuming* that no one would, in such circumstances, wish his will made before marriage to stand, considers it as revoked, or more correctly speaking (as Lord *Kenyon* said, in *Lancashire* v. *Lancashire*[1]), it presumes a tacit intention, when a man first makes his will, that it shall not stand in such case; this presumption, it has been held[2], may be rebutted by parol evidence, though it could not be enforced by it[3]. But where a man, after having made a will, executes deeds, by which he takes a new estate, parol evidence cannot be received to show that the testator meant his will to continue, because the will is not revoked on the ground of intention, but by the statute of wills could never operate on any estate acquired after it was made.

[1] 5 T. R. 49.

[2] Brady dem. Norris v. Cubit, Dougl. 31. Sed. Qu. Vide post, [383].

[3] Doe dem. Lancashire v. Lancashire, 5 T. Rep. 49. Goodtitle dem. Holford and others, v. Otway, 2 H. Black. 516.

[116]

The *ambiguitas patens*, viz. that which arises on the face of the deed or will itself, is (it is said) never helped by averment or parol evidence; for, says Lord *Bacon*, that were in effect to make that pass without deed, which the law appoints shall not pass but by deed. It is necessary for us to attend carefully to this reason, to enable us to distinguish between cases which will otherwise seem to clash with each other; for though it is generally true that in cases where nothing would pass by parol, no evidence *of an expressed intention* can be received to explain an ambiguity on the face of the instrument, and thereby to make that valid which of itself would not avail; yet I conceive that in other cases, both species of ambiguity are open to explanation by parol evidence. Thus, if in a case where no written contract is required, the parties execute a written paper, containing merely the general heads or minutes of an agreement, parol evidence, not inconsistent with the writing, is allowed,

Bacon's Elements, 82.

Ch: II. s. 5. *Ambiguities, patent.*

allowed, for the purpose of enabling a court of justice to put a construction upon it. This occurs daily in the case of policies of insurance and other mercantile contracts, where the usage of a particular trade is received as explanatory of the written instrument[1]. So where a conveyance, which takes its operation from the statute of uses, has in the granting part all the necessary formalities to give it effect, but the consideration is not particularly expressed, (the deed only stating divers good causes and considerations[2],) the grantee may prove the consideration actually paid; and, in like manner, if money be the only consideration stated on the deed, it may be shown that a marriage between the parties also formed part of the consideration; for this stands with the deed, and is not contradictory of it[3]. So where a conveyance was said to be in consideration of 28*l.* a parish, on a question of settlement, was permitted to show that 30*l.* was the sum actually paid[4]. On the contrary, in cases within the statute of frauds, which requires that the contract shall be in writing, if the writing do not clearly express what the contract is, so as to enable a court of justice to put a construction upon it, without the aid of parol testimony, the whole is a nullity; for the admission of parol testimony in this case, to support a contract not valid in itself, would be attended with all the mischief which the statute was calculated to prevent.

[1] Chaurand *v.* Angerstein, Peak. N. P. Cas. 43.

[2] Shep. Touch. 222. 510.

[3] 1 Co. 176, a.

[4] Rex *v.* Inhabitants of Scammonden, 3 T. Rep. 474.

Vide post, [211. 218.]

In the case of a will where the devisee's name was totally omitted, parol evidence to show who was meant, was rejected[5]; but where a clerk was presented to a church, and instituted, and a blank left in the bishop's register for the name of the patron, this omission was permitted to be supplied by parol testimony[6], for the presentation might have been by parol, and therefore it was not in effect to make that pass

[117]

[5] Ballis and Church *v.* Attorney-General, Bul. N. P. 298. 2 Atk. 240. S.C.

[6] Bishop of Meath *v.* Ld. Belfield, 1 Wils. 215.

Ch. II. s. 5. *Ambiguities, patent.*

pass by parol, which the law requires to be done by writing, as would have been the case if the like evidence had been admitted to supply the blank left in the will.

2 Black. 1249.

But courts of justice are in all cases extremely cautious in admitting parol evidence to supply or explain a written instrument. It never ought to be suffered to explain away or contradict an explicit agreement, for that is in effect to vary it; and, therefore, where there was an agreement for a lease of twenty-one years, at 26*l.* per annum, the lessor was not permitted to prove that the lessee was also to pay a sum of 2*l.* 12*s.* 6*d.* a year to the ground landlord; but it was said, in this case, that collateral matters, about which the agreement was silent, as that the landlord was to repair, or the like, might be supplied by parol evidence. So where an agreement was made between two persons in the following words: "I. *J. M.* do hereby agree with *J. C.* to serve me three years to learn the business of a carpenter: the first year to have 1*s.* 2*d.* per day, the second year 1*s.* 6*d.* per day, the third year 1*s.* 10*d.* per day, as witness my hand;" which agreement was signed by both parties; it was held to be competent to a parish, when *J. C*'s settlement came in question, to prove by parol that at the time of signing the agreement, *J. C.* agreed to give *J. M.* three guineas, and that he was not to be, and in fact never was employed in any other work than that of a carpenter; for this evidence did not contradict the agreement, but was given to ascertain a fact collateral to it, in order to explain the intention of the parties; the instrument being in some measure equivocal whether he was to be an apprentice or a servant.

Preston *v.* Merceau, Ibid.

Rex *v.* Inhabitants of Laindon, 8 T. Rep. 379.

[118]

Ibid. 384. Per Lawrence, J.

[119]

Another distinction may also be made as to the *ambiguitas patens*, and that is in the case of ancient instruments; for if doubts arise as to the construction

Ch. II. s. 5. *Ambiguities, patent.*

tion and meaning of them, the uniform usage which has prevailed under them is received as evidence of the original intention of the parties. Lord *Coke*, in one place, says, that *contemporanea expositio est fortissima in lege*, but it is plain that this was said only with reference to the opinions and writings of contemporary lawyers on an ancient statute, and not as to the usage of the parties; but in another place speaking of claims under old charters before justices in eyre, he says, "If the words were general, and a continual possession pleaded of the franchises claimed; or if the claim were by *old and obscure words*, and the party, in pleading them, expounding them to the court, and *averring continual possession according to that exposition*, the entry was *inquiratur super possessionem et usum*, which he adds, I have observed in divers records of those eyres according to the old rule *optimus interpres rerum usus*; and it is said by the court in Vaughan, 169, that "where the penning of a statute is dubious, long usage is a just medium to expound it by; for *jus et norma loquendi* is governed by usage, and the meaning of things spoken or written, must be, as it hath constantly been received to be, by common acceptation."

2 Inst. 11.

Ibid. 282.

[120]

The first instance, however, which I find of this doctrine having been acted upon, is in the case of the *Attorney-General* v. *Parker*[1], where the right of election being given by a deed, founding a charity, to *parishioners* and *inhabitants*, Lord *Hardwicke* admitted evidence of the usage for all *housekeepers* to vote, as explanatory of the words *parishioners* and *inhabitants*. The same kind of evidence has been received in many subsequent cases[2] depending on the construction of charters, and in the last which occurred[3], the usage was much relied on by the court in forming their decision. In that case Lord *Kenyon* said, that both *private deeds* and the *king's* *charters*

[1] 3 Atk. 576.

[2] Blankley *v.* Winstanley, 3 T. Rep. 279. Gape *v.* Handley, Ibid. 288. Rex *v.* Bellringer, 4 T. Rep. 810. Rex *v.* Varlo, Cowp. 248.

[3] Whitnall *v.* Gartham, 6 T. Rep. 388. Vide also Rex. *v.* Osbourne, 4 East, 327.

Ch. II. s. 5. *Ambiguities, patent.*

charters might be expounded by the usage which had taken place under them; and accordingly we find that on a question, whether a covenant for renewal in a lease should be deemed to be a covenant for perpetual renewal, or only for one other lease[1], evidence of several former renewals was received as the construction which the parties themselves had put on the preceding leases, and of their intention at the time of granting that in question. The doctrine of this latter case, however, has been since questioned; and, on a similar case[2] coming before Lord *Alvanley*, when Master of the Rolls, his lordship said he strongly protested against construing legal instruments by the equivocal act of the parties and their understanding; and the late Master of the Rolls (Sir *William Grant*,) in a still later case of the same description, concurred with him in that opinion[3].

[1] Cooke *v.* Booth, Cowp. 819.

[121]

[2] Baynham *v.* Guy's Hospital, 3 Ves. jun. 295.

[3] Moore *v.* Foley, 6 Ves. jun. 232.

In another case[4], which came before Lord *Eldon*, as Chancellor, his lordship said, "he should state his opinion with great reserve. It was, that in no case would it be competent to bring upon the record the fact, with reference to the former leases, as explaining the contract contained in the last lease;" but as such evidence had been stated and relied on in the case of *Cooke* v. *Booth*, his lordship retained the bill for twelve months, with liberty for the plaintiff to bring an action on the covenant. An action was accordingly brought in the Court of King's Bench[5], and the plaintiff averred in his declaration, that the covenants in the deed "corresponded with those expressed in *various* other leases before then successively made and executed on renewals *from time to time* granted at the like yearly rent, and in consideration of the like sum paid in nature of a fine upon *any such renewal*." The construction of the deed, as affected by the former deeds,

[4] Iggulden *v.* May, 9 Ves. jun. 325.

[5] Same parties, 7 East, 237.

deeds, was argued at considerable length, on a demurrer to the defendant's plea. On the words of the covenant, the court were of opinion there was no covenant for perpetual renewal. On the effect of the averment, Lord *Ellenborough*, in delivering the opinion of the court, said, that though the case of *Cooke* v. *Booth* was very analogous to the present, yet there was a distinction between them. In that case the series of successive renewals, from the first downwards, was *uniform and unbroken*; whereas, in the present case, it was only alleged that the covenant corresponded with those in *various* other leases successively made; which allegation as to *various* other leases might be true, although there should have been several instances to the contrary. His lordship added, that the fact stated respecting the successive renewals being so materially different, this case could not be governed by *Cooke* v. *Booth*, even "if it were competent in *any* form of action to bring upon the record the fact with reference to former leases, as explaining the contract contained in the last lease," upon which point very great and serious doubts had been entertained, and which it was not necessary then to decide. A writ of error was afterwards brought and the case argued in the Exchequer Chamber, when the judgment of the King's Bench was affirmed, and Lord C. J. *Mansfield*, in delivering the opinion of the court, said, that the renewals which had taken place could not be used by way of argument on the occasion. It was true that similar renewals were allowed to operate upon the judgment of the court in *Cooke* v. *Booth*, but that was the first time that the acts of parties to a deed were ever made use of in a court of law to assist the construction of a deed. Suppose the original lessor to have declared in the presence of fifty witnesses that he intended to bind himself by the lease to a perpetual renewal,

2 Bos. & Pul. N. R. 449.

Ch. II. s. 5. *Ambiguities, patent.*

renewal, his declaration could not have been allowed to alter the construction of the lease itself. If so, why should the subsequent renewals, which are not evidence either so strong or so unequivocal as the declaration of the lessor, be allowed to alter the construction?

Deed shown to be obtained by fraud.

Cases of *fraud*, do not, as was observed before, fall within the principle on which parol evidence is rejected; and therefore parol evidence may be produced to show that an instrument was stated to the maker of it to be a different thing from what it really was; as where a deed is falsely read to a grantor. So where a testator having made one will, afterwards made another, the provisions of which were widely different, parol evidence that the testator, at the time of the execution of the second will, inquired whether it was the same as the former, and was answered in the affirmative, was held to be admissible, for this did not go to contradict that which was allowed to be a valid instrument, but to set it aside altogether, as being obtained by fraud and imposition.

Doe dem. Small *v.* Allen, 8 T. Rep. 147.

Shep. Touch. 823. 510.

So, though in general an averment shall not be allowed against a deed that there was no consideration given, when there is an express consideration stated upon the deed, yet where a deed was obtained under very suspicious circumstances, and appeared on the face of it to be made in consideration of a sum of money greatly inadequate to the value of the estate conveyed, and also of love and affection, an issue was directed to try whether love and affection did in fact form any part of the consideration, and being found in the negative, the deed was set aside: while, on the other hand, where a deed was made to two persons, one of whom was not related in blood to the grantor, and a money consideration was expressed on the face of the deed, the Master of the Rolls

Filmer *v.* Gott, 7 Bro. Parl. Cas. 70.

Clarkson *v.* Hanway, 2 P. Will. 203.

Rolls would not permit the grantors to show that love and affection also formed part of the consideration; and Lord *Macclesfield* confirmed the decree. If a deed be founded on an usurious or other illegal consideration, this may be shown, notwithstanding the deed on the face of it is perfectly fair and legal.

Ch. II. s. 5. *Deed, fraudulent.*

Vide B. N. P. 173.

CHAP. III.

[122]

OF PAROL EVIDENCE.

HAVING had occasion in the preceding chapters, to mention in what *cases* parol evidence was admissible; the principal object of our present inquiry will be, what *persons* are not permitted to give evidence, or privileged from examination, when unwilling to be called: to which I shall add, a few observations on the examination of witnesses.

Ch. III.

SECTION I.

Of Persons incompetent to give Evidence, by reason of the Imbecility of their Understandings.

ALL persons who are examined as witnesses, must be fully possessed of their understanding, that is, such an understanding as enables them to retain in memory the events of which they have been witnesses, and gives them a knowledge of right and wrong. *Idiots* and *lunatics*, while under the influence of their malady, not possessing this share of understanding, are excluded; as are also *children* of so early an age, as to be incapable of any sense of truth. As a general rule, fourteen is said to be the age

Ch. III. s. 1. *Idiots, &c.*

Bul. N. P. 293.

[123]

Co. Lit. 6, b. Gilb. Law Ev. 147.

Ch. III. s. 1. *Children.*

age at which a child may be a witness; for then *all* are supposed to have attained a competent knowledge of right and wrong; but short of that age, the receipt or rejection of his testimony must, in every case, depend upon the sense of religion, and apparent understanding of the child, when examined previous to the oath being administered to him (*a*). A person, deaf and dumb, if of sense to have intelligence conveyed to him, may be a witness, and give his evidence by signs, through the medium of an interpreter.

Rutton's Cas. Leach Cro Cas. 455.

(*a*) In the case of the *King* v. *Travers*, 2 Stra. 70, the prisoner was indicted for a rape on a child of six years old, and Lord C. B. *Gilbert* refused to admit the child as a witness, wherefore the prisoner was acquitted. He was then indicted for an assault, with intent to ravish, and the indictment coming on to be tried before *Raymond*, C. J. at the next assizes but one, the same objection was taken by *Comyns* and *Darnell*, serjeants, that the girl being then but seven years of age, could not be a witness. The counsel for the prosecution endeavoured to distinguish the case of a misdemeanor from that of a capital offence; but *Raymond*, C. J. held, that there was no difference between offences capital and lesser offences, in this respect, and that a person who could not be a witness in one case, could not in the other. He said, that the reason why the law prohibited the evidence of a child so young was, because the child could not be presumed to distinguish between right and wrong: no person had ever been admitted under the age of nine years, and very seldom under ten. He then mentioned two cases at the Old Bailey, and rejecting the evidence of the child, the defendant was acquitted.

But in *Brasier's* case, 12th April, 1779 (Bul. N. P. 293; Leach. Cro. Cas. 237) the question was again considered by all the judges, and they held, that a child of any age might be examined on an indictment for an assault on her with intent to ravish, if she appeared to be acquainted with the nature and obligation of an oath.

See the several cases collected in 1 East's Cro. Law, 441.

SECTION II.

Of Persons incompetent, by reason of the Infamy of their Characters.

Ch. III. s. 2. *Competent and Credible.*

In the next place, the moral character of a witness is to be considered. When stigmatized by a conviction of certain crimes, his evidence is wholly inadmissible, and he becomes what the law calls an *incompetent* witness (*b*); but other crimes, though much detracting from the character and *credibility* of a man, do not render him so totally infamous as to prevent him from being heard in a court of justice: nevertheless, the parol testimony of witnesses upon oath, as to his general character, is received as evidence, to be left to a jury, whether such a man is a person on whose testimony reliance can be placed. The *viva voce* evidence to destroy the credit of a witness, must be that of persons who have known his *general character*, and who take upon themselves to swear from such knowledge, that they would not believe him upon his oath. This general evidence is all they are allowed to give *against* him, for no man can be supposed prepared to give a history of all the transactions of his life, in answer to a charge suddenly made upon him in a court of justice; but the party, whose interest it is to support his

[125]

4 St. Tr. 692. Rex *v.* Taylor, Peak. N. P. 11. Bul. N. P. 296.

(*b*) No two words have been more frequently confounded together, and consequently less understood, than those of *competent* and *credible*. A witness is properly said to be *competent*, whenever he can be at all examined before a court of justice, and this *competency* is a question of *law* to be determined by the *judge*, previous to his giving evidence in the cause. If the law permits him to be examined, his *credibility* forms the most important part of the consideration of a *jury*, and they must decide on this according to the opposing or corroborating circumstances of the case. The expression of "credible witness" is often used in acts of parliament, but this means nothing more than that the magistrate shall judge as the jury would do of his *credibility*, but leaves the question of his *competency* as before. 1 Burr. 417.

Ch. III. s. 2. *General Character.*

character, may call upon the witness against him to declare the grounds on which their opinion of him is founded. Though only *general evidence* can be given as to his *general character*, yet declarations made by him on the same subject, contrary to what he swears at the trial, whether on his original or cross-examination, may be given in evidence to impeach his credit; and even after the death of a subscribing witness, a confession made by him on his death-bed, that the will which he attested was a forgery, may be given in evidence to rebut the presumption arising from proof of his hand-writing.

[126]

Wright dem. Clymer v. Littler, 3 Burr. 1244. Hardwell v. Jarman, Taunton Sp. Ass. 1789. Hastings' case, D. P. 11 June, 1789, per Lord C. Thurlow, Vide Bul. N. P. 297.

It should here be understood, that it is the party *against* whom a witness is called only, that is permitted to attack his character by *general evidence*; for if the same privilege were allowed to the party calling him, the consequence would be, that such party might destroy the credit of a witness if he spoke against his wishes, and make him a good witness if his evidence was favourable, at the same time that he had the means of destroying his credit in his hands. But if a witness prove *facts* in a cause which make against the party who calls him, that party, as well as the other, may call other witnesses to contradict him as to those facts; for such facts are evidence in the cause, and the other witnesses are not called directly to discredit the first, but the impeachment of his credit is incidental, and consequential only.

Ibid. See also Alexander v. Gibson, 2 Campb. 555.

Conviction of Crimes.

But to return to those offences, a conviction of which totally excludes the testimony of a witness, and renders him incompetent.

Pendock dem. Mackinder v. Mackinder, 2 Wils. 218.

Treason or felony, and every species of what is called in our books the *crimen falsi*, such as perjury, conspiracy to accuse another of a crime, barratry, attaint of false verdict, bribing a witness to absent himself from giving evidence, &c. prevent

prevent a man, when convicted of them, from being examined in a court of justice. According to the ancient notion, every offence which subjected a man to the pillory, and for which he was sentenced to stand there, whether followed with that punishment or not, was considered as rendering him infamous [1]; but the modern practice has with more propriety been to consider the *offence* and not the *punishment*, as that to which infamy is attached; and it is now held, that unless a man is sentenced to the pillory for a crime partaking of fraud, the mere circumstance of an infamous punishment being inflicted, does not destroy his competency [2]; and, therefore, a man being convicted of a treasonable libel, or slanderous words on the government, and for that sentenced to the pillory [3], is not thereby rendered incompetent; and on the other hand, if he be convicted of barratry, or other infamous offence, though he is only sentenced to be fined, such conviction renders him incompetent [4].

[127]

[1] Vide Com. Dig. Testmoigne, (A.) 2. Co. Lit. 6, b.

[2] Rex v. Priddle, Leach Cro. Cas. 496. Clancey's case, Fortescue, 208. Vide Salk. 689, 690.

[3] Chater v. Hawkins, 3 Lev. 426.

[4] Rex v. Ford, Salk. 690. Vide etiam Pendock dem. Mackinder v. Mackinder, 2 Wils. 18; Willes, 667.

When a man is convicted of any of the offences before mentioned, and judgment entered up, he is for ever afterwards incompetent to give evidence, unless the stigma is removed, which in case of a conviction of perjury, on the statute of 5 Eliz. c. 9, can never be by any means short of a reversal of the judgment, for the statute has in this case made his incompetency a part of the punishment [5]; but if a man be convicted of felony or of perjury, or any other offence at common law, and the king pardon him by name, or grant a general pardon to all such convicts, this restores him to his credit,[6] and the judgment no longer forms an objection to his testimony. In these cases, however, an actual pardon must be shown under the great seal, the warrant for it under the king's sign manual not being sufficient [7]. Peers of parliament and clergymen, who are entitled to benefit

[128]

[5] Rex v. Crosby, Salk. 289.

[6] Vide 1 Ventr. 349. 4 St. Tr. 682.

[7] Gully's case, Leach Cr. Cas. 115.

Ch. III. s. 2. *Convicted of Crimes.*

of clergy unconditionally[1], and where no judgment is given, are not incapacitated by the conviction of a clergyable offence. But, in other cases, the convict is incompetent till restored by one of the means pointed out by the statutes, in lieu of the old mode of purgation. If he be burnt in the hand and discharged, his credit is thereby restored, and he becomes a competent witness, because the burning in the hand amounts to a statute pardon[2], which, whether particular or general, always restores competency; and in this case, if the record be produced whereby clergy was granted, it is sufficient, without proving that he was actually burnt[3]. By stats. 4 Geo. 1, c. 11; and 19 Geo. 3, c. 74, if a person convicted of a clergyable offence be transported, fined, or whipped, instead of being burnt, his competency is also restored; but when judgment of death is given, and the convict receives a conditional pardon on being transported for life, he is not thereby rendered competent (*c*); and by stat. 31 Geo. 3, c. 35, it is enacted, that no person shall be an incompetent witness by reason of a conviction of petty larceny. Still, though *competent*, the conviction in all these cases would much affect his *credit* with a jury.

[1] Stat. 1 Ed. 6, c. 12, s. 4.

[2] Rex *v.* Lord Castlemain, Sir. T. Raym. 380; Kel. 37.

[3] Per Trevor, 7 Ann. Com. Dig. Testmoigne, (A.)4.

To found this objection to the testimony of a witness, the party who intends to make it should be prepared with a copy of the judgment regularly entered upon the verdict of conviction; for until such judgment is entered, the witness is not deprived of his legal privileges[4]. This proof was formerly as now the only mode by which the objection could be raised, for it was then considered as a rule, that

[4] Wicks *v.* Smallbrooke, 1 Sid. 51. Lee *v.* Gansel, Cowp. 3. See also Rex *v.* Teal, cited post.

[129]

(c) Vide *Bullock* v. *Dodds*, 2 Barn. & Ald. 258, in which it was holden that a capital convict, who was pardoned on condition of transportation for life, was not restored to his legal abilities by having gone to *Botany Bay* and returned from thence by the licence of the governor, though such governor had power by his commission to remit any part of the sentence.

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no man could be examined to prove his own infamy [1]: But according to a modern decision on this subject, though a man cannot be asked any question tending to convict him of a crime [2], and thereby be put in danger from his own examination, yet he may be asked whether he has been already convicted, and has suffered the judgment of the law; for his answer to these questions can put him in no further peril; and therefore when a man came to justify himself as bail, the counsel opposing him was permitted to ask him, whether he had not stood in the pillory for perjury; and, on his admitting the fact, he was of course rejected; but in a very late case the old rule was adhered to, and it was held that a man could not be rendered incompetent by his own acknowledgment that he had been convicted of felony, but that a copy of the judgment should be produced.

Ch. III. s. 2. *Convicted of Crimes.*

[1] Vide Wood's Inst. 594. Bul. N. P. 292.

[2] Rex *v.* Edwards, 4 T. Rep. 440.

Rex *v.* Inhabitants of Castel Careinion, 8 East, 77.

The practice of asking a witness either on the *voir dire*, or on cross-examination, any question, except such as might tend to make him accuse himself of a crime of which he had not been convicted, and thereby expose himself to prosecution, had so long continued without objection, that no one at the bar thought of questioning the legality of it. But some of the judges, struck perhaps with the injury which in some few instances, have been done to the feelings of an honourable and virtuous mind, and relying on the *dicta* of some of their predecessors, have lately thought that neither convenience nor authority justifies this mode of examination; and have therefore laid it down as a rule, that a witness shall not be rendered *infamous*, or even *disgraced* by his own examination, as to facts not connected with the cause in which he is examined. The highest and most enlightened characters in the profession were, at one time, much divided on this point; and even in the decisions which have taken place since the first publication of this work, different judges

Disgraced by their own examination.

[130]

Ch. III. s. 2. *Discrediting them.*

appear to have proceeded on different principles, and to have rejected or permitted the examination to different extents.

The first case which came before the court after the original publication of this book, and while the subject continued to excite some interest in Westminster-Hall, was that of the *King* v. *the inhabitants of Castel Careinion*, before cited, wherein the court decided that the record of conviction must be produced to reject the testimony of a witness; and after several decisions at Nisi Prius, wherein nothing was decided, arose the case of *Spenchley, qui tam*, v. *De Willot*. That was an action for usury; the defendant's counsel wished to cross-examine the plaintiff's witness, *as to contracts made with several other* persons, from whom he had taken up money; for the purpose either of raising an inference that the transaction with the defendant was of the same description, or, in case the witness misrepresented those transactions, of entitling themselves to call the persons with whom they took place to contradict him. Lord *Ellenborough*, at Nisi Prius refused to permit these questions to be put to the witness: and a motion being made for a new trial, the court were all decidedly of opinion, that it was not competent to counsel, on cross-examination, to question the witness concerning a fact wholly irrelevant to the matter in issue, if answered affirmatively, for the purpose of discrediting him if he answered in the negative. They observed, that the rule had been laid down again and again, that, upon cross-examination to try the credit of a witness, only general questions could be put; and he could not be asked as to any collateral and independent fact, merely with a view to contradict him afterwards by calling another witness. The danger of such a practice they said would be obvious, besides the inconvenience of trying as many collateral issues as one of the parties chose to introduce.

Vide ante, 133.

Spenchley *v.* De Willot, 7 East, 108.

introduce. Lord *Ellenborough* added, that he had ruled this point again and again at the sittings, till he was quite tired of the agitation of the question; and therefore he wished that a bill of exceptions should be tendered by any party who was dissatisfied with his judgment, that the question might be finally put at rest.

In these cases we may observe, that the court would not permit any examination into matters not immediately connected with the cause, for the purpose of impeaching the character and credibility of the witness. In others, which came before Mr. Justice *Lawrence*, he permitted questions to be asked the witness, as to his conduct in attempting to dissuade other witnesses from attending to give evidence in the cause[1], or as to his having been himself charged with felony, by the person against whom he appeared as a witness[2]; but ruled, that his answer must be taken as to the fact, and that no other witness could be called to contradict him; thereby, in some respects, breaking in upon the rule, that he could not be disgraced by his own examination. In the course of the proceedings on the bill of pains and penalties against the Queen, the House of Lords and the Judges seem to have gone still further; for when an attempt was made to discredit a witness of the name of *Sacchi*, by showing that he had attempted to suborn other persons to become witnesses against the Queen, no question was made whether other witnesses could be called to prove that fact, but only, whether it was competent so to impeach his credit, without first cross-examining him as to its existence. While the point was new, I offered to the profession, as part of the text, such arguments as appeared to me applicable to both sides of it; but as it may now be considered as settled, that matters wholly foreign to the cause cannot be inquired into from the witness himself, those arguments are now reprinted in the Appendix.

[1] Harris *v.* Tippet, 2 Campb. 637. Append.

[2] Yewen's case, Ibid. 633.

Ch. III. s. 2.

Accomplices or joint Trespassers.

One who is *particeps criminis* is a competent witness for the plaintiff or prosecutor, in every case, though left out of the declaration or indictment, for the purpose of being called as a witness; and if he has been made a defendant, he may at any time be made a witness, by entering a *nolle prosequi* as to him. In trespasses, where a satisfaction by one is a discharge of the others, it may go to his credit; and much more so in criminal cases, where a promise of pardon has been given him, but no actual pardon granted. Indeed it has been thought by some, that in a criminal case, a witness who has had a promise of pardon is thereby rendered incompetent on account of the strong bias which the promise must give to his mind, but this is now considered as affecting his credit only: and even where a woman admitted, on her examination, that she had sworn falsely against a person whom she charged with being the father of a bastard child; she was still considered as competent to prove, on an indictment for a conspiracy, against third persons that they had suborned her to commit the perjury. And in like manner, in an action against a defendant as part owner of a ship: a person who had made an affidavit that the defendant was such part owner, in order to have his name entered as such in the register, was held to be competent to prove that he had inserted his name without his consent, and that in fact the defendant had no interest.

Vide Gilb. Ev. 139. Cases Temp. Hard. 163. Bul. N.P. 286, and cases there cited.

[139]

Dr. Dodd's Cas. Leach Cro. Cas. 184.

See Rudd's case, post, 160.

Rex *v.* Teal, 11 East, 307.

Rands *v.* Thomas, 5 M. & S. 244.

Religion.

Under this head, of the moral character of witnesses, may be classed the notice which the law takes of their religious principles or prejudices. At the time when a gloomy superstition had obscured all liberal sentiment, we are not to suppose that our own laws, more than those of surrounding nations (*d*),

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(*d*) It has been observed by Sir *Matthew Hale*, that the *Spaniards* had special laws touching the form of oaths to infidels: and

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were favourable to men whom the austerity of its professors stigmatized as *infidels*. Those to whom the divine doctrines of the Gospel were unknown, were deemed incapable of binding themselves by the solemn obligations of an oath, the zeal of our ancestors not permitting them to believe that the prophane rites of another religion could be obligatory on the consciences of its votaries, or be legally acknowledged in a Christian court of justice. *Jews* were received in the common law courts, because they could swear on the Old Testament, which is part of our belief; but the civil law went so far as to exclude even them, and all *heretics*, from examination. I am not aware that it has ever been expressly determined that *excommunicated persons* cannot be received as witnesses, though *dicta* are to be found which go to establish the position; had the question arisen even before the late statute, a contrary decision would probably have taken place, for in modern times much more liberality has been shown in this particular. But now, by statute 53 Geo. 3, c. 127, s. 3, it is enacted, that no person who shall be declared or denounced excommunicate shall incur any civil penalty or incapacity whatever in consequence of such excommunication, save such imprisonment, not exceeding six months, as the court pronouncing such person excommunicate shall direct. Sir *Matthew Hale*, to whom the want of care or zeal in protecting the religion of his country can never be imputed, seems to have been of opinion that *infidels* might, in some cases, be examined, for he puts them all on the same footing as *Jews*, and observes, that, "it were

Co. Lit. 6. Hawk. P. C. 434.

[140]

Vide Gilb. Law Ev. 145. 2 Hal. P. C. 279.

Gilb. Law Ev. 146.

2 Hal. P.C. 729.

Lord *Mansfield*, then solicitor-general, in his argument in the great case of *Omichund* v. *Barker*, also mentioned, that in *Spain*, *Moors* were, in very early times, permitted to swear on the Koran, and cites the form of their oath from *Selden*. We are not to ascribe this deviation from the practice at that time common in Christian countries, to any extraordinary liberality in the minds of the *Spaniards*, but to the divided empire which the *Moors* held with them, and which would necessarily be the cause of much indulgence to the latter.

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Ch. III. s. 2. *Religion.*

a very hard case, if a murder committed here in *England*, in presence only of a *Turk* or a *Jew*, that owns not the Christian religion, should be dispunishable, because such an oath should not be taken which the witness held binding, and cannot swear otherwise; and possibly might think himself under no obligation if sworn according to the usual style of the courts of *England*. But then, (he adds) it is agreed that the credit of such a testimony must be left to the jury (*e*)." Notwithstanding this, the general received opinion was, that they could not be witnesses, till the case of *Omichund* v. *Barker* came before Lord *Hardwicke*, when it was solemnly decided by him, assisted by the two chief justices (*Lee* and *Willes*), and the Chief Baron *Parker*, that the evidence of a Gentoo, sworn according to the ceremonies of his own religion, was admissible: and the general principle established, that the testimony of all infidels, who are not atheists, was to be received (*f*). In a late case before Mr. Justice *Buller*, he would not suffer the particular opinions of a man, professing the Christian religion, to be examined into; but made

[141]

Omichund *v.* Barker, 1 Atk. 21; 1 Wils. 84, S. C. Willes, 538, S. C.

Rex *v.* Taylor, Peak. N. P. 11.

Rex *v.* White, Leach's Cro. Cas. 482.

(*e*) How different is this mild and humane language, from the intemperate zeal of Sir *Edward Coke*, who says, "that all *infidels* are in law perpetual enemies; for between them, as with the devils whose subjects they be, and the Christian, there is perpetual hostility, and can be no peace." Vide *Calvin's* case, 7 Co. 17, a.

(*f*) So in *Fachina* v. *Sabine*, 2 Str. 1104, it was held at the council, in the presence of the two chief justices, that a Mahomedan might be sworn on the Koran. See also *Morgan's* case, Leach's Cro. Cas. 64. By the report of Lord C. J. *Willes'* judgment, from his own MSS. lately published, it should seem that he confined his opinion, as to the admissibility of *Gentoos*, to the particular case of a contract made in a foreign country, but the subsequent decisions have left no doubt that they are admissible in all cases. At the O.B. Sess. Dec. 1804, *Erpune*, a native of China, being examined as a witness (before Mr. B. *Graham*) on an indictment against *Ann Alsley* and *Thomas Gunn*, for felony, was sworn according to the form of the courts of China, viz. by holding a saucer in his hand, which he dashed to pieces at the conclusion of the oath, believing, as he stated, that God would cause his body to be cracked, as he cracked that saucer, if he did not tell the truth. Sess. Pap. 1804 and 1805, p. 62.

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the only question, whether he believed the sanction of an oath, the being of a Deity, and a future state of rewards and punishments? But a person who has no idea of the being of a God, or a future state, is not admitted.

[142]

Form of swearing.

The usual *form* of administering the oath to Christians is, by the witness laying his hand on the *New Testament*, while the oath is repeated to him, and kissing the book at the conclusion; and the like ceremony is observed with respect to the Jews when they swear on the *Old Testament*: but this form has frequently been dispensed with. In one case, Doctor *Owen*, Vice-Chancellor of *Oxford*, being called as a witness, refused to be sworn by laying his right hand on the book and kissing it, but caused the book to be held open before him, and lifted up his right hand; the jury in this case prayed the opinion of the court, if they ought to think this testimony as strong as that of a witness otherwise sworn; and *Glin*, Chief Justice, told them, that in his opinion, he had taken as strong an oath as any other witness; but said, that if he were sworn himself, he would kiss the book. In like manner, a *Scotch covenantor* has been permitted to swear by holding up his hand [1]; and a man who was educated a Jew, but at the time of giving his evidence professed Christianity, though he had never been baptised, nor formally renounced Judaism, was also permitted by Lord *Kenyon* to swear on the New Testament [2]; for, as Lord Chief Baron *Parker* observed, in *Omichund* v. *Barker* [3], "Oaths are to be administered to all persons according to their own opinions, and as it most affects their consciences." In the proceedings before the House of Lords, on the bill of pains and penalties against the Queen, (August 24, 1820,) certain Italian witnesses were examined, and they having been sworn in the ordinary form, the counsel for

Dutton *v.* Colt, 2 Sid. 6.

[1] Mildrone's case, Leach. Cro. Cas. 459. Mee *v.* Reed, Peak. N. P. 28.

[2] Rex *v.* Gilham, 1 Esp. Cas. 285.

[3] 1 Atk. 42. See also Cowp. 389.

[143]

Ch. III. s. 2. *Religion.*

for the Queen, on the authority of this expression, were proceeding to inquire of the witness, "whether there were any forms wanting in the oath, which would be used in his own country, and which he deemed necessary to the binding his conscience?" and an objection being made to this course of examination, a question was propounded to the judges, who answered, "That although the witness should have taken the oath in the usual form, without making any objection, he might nevertheless be afterwards asked, whether he considered the oath he had taken as binding on his conscience? and that if he answered in the affirmative, he should not be questioned whether he considered any other mode of taking an oath more binding." This certainly is the best test of truth; and the legislature, on this ground, have, by several acts of parliament, (viz. 7 & 8 Will. 3, c. 34; 1 Geo. 1, st. 2, c. 6; 8 Geo. 1, c. 6, and 22 Geo. 2, c. 30, s. 46,) dispensed with any oaths at all from *Quakers* in civil cases; but their affirmation is still inadmissible in criminal proceedings, to charge or exculpate another, though it may be read to exculpate themselves [1]. It has been held, that an appeal of death [2], and motions for informations [3] and attachments [4], or to answer the matters of an affidavit [5], are criminal proceedings within these statutes; and that consequently, in such cases, their affirmation is inadmissible; but that a motion to quash an appointment of overseers [6], or a *qui tam* action [7], are not criminal proceedings, and that in those cases the affirmation of a Quaker may be received (*g*).

[1] Rex *v.* Gardner, 2 Burr. 117.
[2] Castle *v.* Bambridge, 2 Stra. 854.
[3] Rex *v.* Wych, 2 Stra. 872.
[4] Rex *v.* Bell, And. 200.
[5] Oliver *v.* Lawrence, 2 Stra. 946.
[6] Rex *v.* Turner, 2 Stra. 1219.
[7] Atcheson *v.* Everett, Cowp. 382.

(*g*) In this case of *Atcheson* v. *Everett*, Cowp. 382, Lord *Mansfield* gave a very elaborate judgment on the statutes made for the relief of Quakers, and on the nature of oaths in general; the extensive learning of which, is only equalled by the mild spirit of toleration inculcated by it.

SECTION III.

Of Persons incompetent by reason of their Interest in the Cause. [144]

Ch. III. s. 3. *General Rule.*

THE rule which has the most extensive operation in the exclusion of witnesses, and which has been found most difficult in its application, is that which prevents persons interested in the event of a suit, (unless in a few excepted cases of evident necessity,) from being witnesses in it.—What is such an interest as shall totally exclude testimony, has often been the subject of controversy. The old cases have gone upon very subtle grounds; but, of late years, the courts have endeavoured, as far as possible, consistent with authorities, to let the objection go to the *credit* rather than to the *competency* of a witness; and the general rule now established is, that no objection can be made to a witness on this ground, unless he be directly interested, that is, unless he may be immediately benefited or injured by the event of the suit; or unless the verdict to be obtained by his evidence, or given against it, will be evidence for or against him in another action in which he may afterwards be a party. Any smaller degree of interest, as the possibility that he may be liable to an action in a certain event, or that standing in a similar situation with the party, by whom he is called, the decision in that cause may, by possibility, influence the minds of the jury in his own, or the like; though it furnishes a strong argument against his *credibility*, does not destroy his *competency*. Thus, in one case, where *A. B.* and *C.* having, in a joint deposition in Chancery, sworn to the same fact, the party injured brought three several actions on the statute of Eliz. for perjury; and in another, where several

Per Lord Mansfield, 1 T. Rep. 300.

Vide Bent *v.* Baker, Append.

1 T. R. 163. [145]

Gunstone *v.* Downs, 2 Roll. Ab. 685. Bath *v.* Montague, cited Fortescue's Rep. 247.

Ch. III. s. 3. *Interest.*

several persons having sworn to the same fact, were severally indicted; it was permitted to one to give evidence, on the trials of the others, in their favour; for until conviction, he could not be rejected as infamous; and he was not directly interested, inasmuch as the acquittal of the others would be no evidence for him. So a woman, whose husband was under sentence of death, was held to be a competent witness on an indictment against others for the same offence, though she confessed that she had hopes the conviction of the others might procure a pardon for her husband; for such pardon was not a necessary consequence of that conviction.

Rudd's Cas. Leach. Cro. Cas. 151.

Parties injured in Criminal Prosecutions.

Many cases have arisen, and many contradictory decisions are to be found in the books, on the question, how far persons who have been defrauded of securities, or injured by a perjury, or other crime, can be witnesses in prosecutions for those offences, the event of which might *possibly* exonerate them from the obligation they are charged to have entered into, or restore to them money which they have been obliged to pay? But the general principle now established is, that "the question in a criminal prosecution, or penal action, being the same with that in a civil cause in which the witness is interested, goes generally to the credit, unless the judgment, in the prosecution where he is a witness, can be given in evidence in the cause wherein he is interested (*h*)." And if, as I have

[146]

Ante, p. 46.

(*h*) The cases on this point are so contradictory, that it is impossible to reconcile them. In *Watt's* case, Hard. 331, it is laid down as a general rule, that in the case of perjury, he who is injured by the perjury, cannot be a witness on an indictment for it; and in the case of *Rex* v. *Whiting*, 1 Salk. 283, it was held, that a woman who had been induced by the fraud of the defendant, to sign a note of hand, could not be a witness against him, because his conviction would *influence* the jury on the trial of an action on the note, though *the record could not be given in evidence*. In the case of the *King* v. *Ellis*, 2 Stra. 1104, a defendant in an ejectment, against whom the verdict was given, was held not to be a witness

I have elsewhere endeavoured to show, the verdict on an indictment on the trial of which a man is examined as a witness, can in no case be evidence for

witness on an indictment for perjury committed on the trial of such ejectment: and in the case of the *King* v. *Nunez*, 2 Stra. 1043, it was determined, that a person who had filed an injunction bill in the Exchequer, to stay proceedings in an action brought on a promissory note, could not be a witness to prove perjury committed in an answer to that bill. *Paris*'s case (1 Ventr. 49, and 1 Sid. 431,) is directly contrary to the *King* v. *Whiting*; the only difference between the two cases is, that one information was for fraudulently procuring a warrant of attorney to confess judgment, the other for so procuring a promissory note. And in the *King* v. *Moise*, (1 Stra. 595,) which was an indictment for tearing a note, the payee of the note was admitted to prove the case. The case of the *King* v. *Whiting* was doubted by Lord *Hardwicke* in the *King* v. *Bray*, Cas. Temp. Hard. 358; and it, together with the cases of the *King* v. *Nunez*, and the *King* v. *Ellis*, are said by Lord *Mansfield*, in 4 Burr. 2255, to have been over-ruled by Lord Chief Justice *Lee*, in the case of the *King* v. *Broughton*, 2 Stra. 1229; and the rule laid down by Lord *Mansfield*, in that book, is, as above stated, "that the question in a criminal prosecution, being the same with a civil cause in which the witness is interested, goes *generally* to the credit; *unless the judgment in the prosecution, where he is a witness, can be given in evidence in the cause where he is interested.*" A distinction, however, may be made between the cases of the *King* v. *Whiting*, &c. and the case of the *King* v. *Broughton*. In the first three cases, the person who was called as a witness might eventually have been benefited, because in the *King* v. *Whiting*, the note was a good instrument till the defendant was convicted. In the *King* v. *Ellis*, the defendant in the ejectment failed at the trial, and he might hope to obtain a verdict in another ejectment, if he succeeded in convicting the defendant on the indictment for perjury; and in the *King* v. *Nunez*, the suit in the Exchequer was still pending. In the case of the *King* v. *Broughton*, the suit in Chancery was ended, and ended in the manner most agreeable to the interest of the witness; for the *Lord Chancellor*, not believing *Broughton*, the defendant in that indictment, had decreed for the witness, so that the witness could not have even the hope of benefiting himself by convicting *Broughton*. The following case clearly establishes the position laid down by Lord *Mansfield*, in the case of *Abrahams* v. *Bunn*, but at the same time as clearly overturns the case of *Rex* v. *Whiting*, and cannot be distinguished from it.—It was the case of *Bartlet* v. *Pickersgil*, (since reported, *Cox's Cases*, 15,) and is cited by Lord *Mansfield*, 4 Burr. 2255, as follows: "The defendant bought an estate for the plaintiff. There was no writing, nor was any part of the money paid by the plaintiff. The defendant articled in his own name, and refused to convey, and by his answer denied any trust; parol evidence was rejected, and the bill was dismissed. The defendant was afterwards indicted for perjury,

Ch. III. s. 3. *Parties injured in Criminal Prosecutions.*

for him in a civil cause; it will follow, that in every case, except those which by inveterate practice may be considered as forming exceptions to this general rule, the party injured is a competent witness.

But though this is the general rule, an exception to it seems to be established in the case of indictments for *forgery*; for it has in many cases been decided, that a person, whose hand-writing has been forged to

[148]

an instrument, whereby, if good, he would be charged with a sum of money; or one who has paid money in consequence of such forgery, cannot be a witness on the indictment for the purpose of proving the forgery, though he may to facts quite collateral to it; or in civil cases where the same question arises (*i*).

Hunter *v.* King, 4 B. & A. 209.

Watts's case, Hard. 331.

In cases where the party injured cannot by possibility derive any benefit from the verdict in the prosecution, as in indictments for assaults, and the

perjury, tried at *York*, and convicted *on the evidence of the plaintiff*, confirmed by circumstances, and the defendant's declarations. The plaintiff then petitioned for a supplemental bill in the nature of a bill of review stating the conviction. But the petition was dismissed, *because the conviction was not evidence.*" In the case of *Abrahams* v. *Bunn*, above-mentioned, the borrower of money was held a good witness to prove the whole case in an action for usury against the lender, and the authority of this case was fully recognized in the late case of *Smith* v. *Prager*. But in an action against the assignee of a bankrupt, for taking usurious interest on a loan to the bankrupt, he not having obtained his certificate, nor paid the money, was not permitted to prove the usury. *Martin* v. *Drayton*, 2 T. Rep. 496. See also the *King* v. *Dalby*, Peak. N. P. 12, where Lord *Kenyon* rejected the testimony of a person who had been injured by a perjury in an indictment for that offence. This question was finally laid at rest in the *King* v. *Boston*, 4 East, 572; where the defendant having been convicted of perjury, in an answer to an injunction bill; and the plaintiff in the bill, and his wife, having (after objection) been admitted as witnesses on the trial, the Court of King's Bench decided that they were competent witnesses: because in no case where a person has been examined on the trial of an indictment, can the verdict on that indictment be used for him. They expressly referred to the case of *Bartlet* v. *Pickersgill*, and recognized its authority. See also the cases cited *ante*, 46.

(*i*) See the several cases on this head, collected in the Digest, at the end of this section, letter (D.)

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like personal injury, his competency has never been doubted.

From what has been already said, it may be taken as a general rule, that a party in a cause cannot be examined as a witness, for he is in the highest degree interested in the event of it (*k*); and though he be barely trustee for another, he has still an interest sufficient to render him incompetent, for he is personally answerable in the first instance for the costs of the suit, and the *chance* he may have of indemnity from the person for whom he acts, does not remove the interest which the *certain* liability creates in him. But where a man is not, in point of fact, at all interested, he may be examined; as where members of a charitable institution are defendants in their *corporate character*, there is no objection to an individual member being examined as a witness for the corporation; because in this case he is giving evidence for the public body only, and cannot be in any manner affected by the verdict; for the costs cannot be levied on him personally, but can only be recovered from the funds of the corporation.

[149]

Rex *v.* St. Mary Magdalen, Bermondsey, 3 East, 7.

Weller *v.* Governors of Foundling Hosp. Peak. Cas. 153.

So in questions as to the rights or immunities of a *corporation*, the evidence of individuals who are not privately interested, though members of the city, may be received: But where corporators, as such, have private interests, as to be free of toll, rights of common, &c. these being really and substantially

Case of Corporation of London, 1 Ventr. 351.

Ld. Howard *v.* Bell, Hob. 92.

[150]

Sandy *v.* Custom-house Officers, Skin. 174.

(*k*) But where one party has agreed to take the affidavit of the other as to a particular fact, and such affidavit has been made accordingly, this is to be taken, for the purpose of the cause, as conclusive evidence of the fact so sworn to, vide *Button* v. *Prettiman*, Sir T. Raym. 153; *aliter* if the affidavit be only engrossed and not sworn, *Stevens and others* v. *Walker*, Peak. N. P. 187. *Vide ante* 11, note (*c*). And in a late case, where one of the parties had by consent been examined at Nisi Prius, the Court of Common Pleas refused to set aside the verdict. *Norden* v. *Twibill*, 1 Taunt. 378.

Ch. III. s. 3. *Parties in a Cause, &c.*

stantially interested in the event of the cause, are no witnesses (*l*).

But there are some instances, where persons substantially interested, and even parties in a cause, are permitted to be examined, from the necessity of the case, and absolute impossibility of procuring other testimony.

In an action, on the statute of *Winton*, the party [151] robbed is a witness (*m*). And, on the same principle of

(*l*) For the instances in which corporators are admitted as witnesses, see Digest at the end of the section, letter (A.)

(*m*) As this is an exception to the general rules of law, the grounds on which the decision proceeded, and the extent of it ought to be accurately understood. The only case on the subject is in 2 Roll. Abr. 685, 686, and from that, it has been laid down in general terms, in all subsequent books, where the subject has been treated of. The case is reported in Rolle as follows:—"In an action against a hundred brought by the master, being a carrier, for a robbery committed on his servant in the absence of the master, *quære* whether the master, being the plaintiff in the action brought, may be a witness to prove that he delivered the monies of which his servant swears he was robbed, before his servant set out on his journey in which he was robbed; for this might be proved by any other, and no person is to be a witness in his own cause, but for necessity; *as if he himself had been robbed, although that he was plaintiff, yet he might be a good witness to prove himself to have been robbed, and of what sum or things, and also to prove that he gave notice to the next vill, and levied hue and cry, for this is of necessity for default of other proof.* But as to proving the delivery of the money to his servant before the robbery, and before he set out on his journey, this might be proved by any other, as well as by him, although it was objected, that it is not safe nor usual for men to call witnesses when they deliver money to carry on a journey, on account of the danger of discovery; and for this reason *per curiam*, against my opinion, it was ruled, that he should be received as a witness." *Bennet* v. *Hundred of Hertford*, Mich. 1650. A similar case occurred before Mr. J. *Chambre*, where a mob having robbed the plaintiff's barge of corn which was carried in it, that part of the case was proved by the servant; but he not knowing the quantity on board, and this case being cited from Bul. N. P. 197, his lordship, on the authority of it, allowed the plaintiff to be examined to prove that fact. *Porter* v. *Hundred of Ragland*, Monm. Spr. Ass. 1802. MS. Note in the stat. 8 Geo. 2, c. 16, s. 15, it is recited, that by the laws then in being the person robbed was a good

of necessity, it has been holden that persons, who become interested in the *common course of business*, and who alone can possibly have knowledge of a fact, may be called as witnesses to prove it; as in the case of a servant, who has paid money, or a porter who, in the way of his business, delivers out or receives parcels; though the evidence, whereby he charges another with the money or goods, exonerates himself from his liability to account to his master for them; for if this interest were to exclude testimony, there would never be any evidence of such facts (*n*).

Bul. N. P. 289. Spencer *v.* Goulding, Peak. N. P. Cas. 129. [152]

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good witness, and the hundredors are thereby made witnesses for the defendant.

Johnson v. *Browning*, 6 Mod. 216. In an action for malicious prosecution, where nobody was by at the time the supposed felony was committed but the defendant's wife, *who could not, in this case, be a witness to prove the felony committed*. *Holt*, C. J. allowed her oath, which she made at the trial of the indictment, to be given in evidence to prove a felony committed; for otherwise one that should be robbed, &c. would be under an intolerable mischief; for if he prosecuted for such robbery, &c. and the party should, at any rate, be acquitted, the prosecutor would be liable to an action for malicious prosecution, without a possibility of making a good defence, though the cause of prosecution was ever so pregnant. *Cobb* v. *Carr*, B. N. P. 14, S. P.

These are the only cases, I believe, in the books, where parties to the cause have been permitted to give evidence for themselves; and, in the latter case, it seems to have been taken for granted, that the party could not be examined, though her former evidence was admitted. It is probable that, in this case, the evidence was given by the plaintiff to show the prosecution, and that being so produced, the judge considered it as evidence for the defendant; and accordingly, in a late case at Nisi Prius, where to prove a malicious charge made before a magistrate the plaintiff produced the defendant's information, Mr. Baron *Richards* observed, that such information being made upon oath, must be presumed to be true till the contrary was proved, and as the plaintiff gave no evidence to show his innocence of the charge, directed the jury to find for the defendant. *Carter* v. *Thomas*, Glo. Spr. Ass. 1816.

(*n*) For other instances, in which persons have been admitted witnesses from necessity, see Digest of Cases at the end of this section, letter (A.) plac. 8. (B.) plac. 1, 2, 3, 4, 5, 6. 13. (F.) plac. 2.

Ch. III. s. 3. *Parties in a Cause.*

Gilb. Law Ev. 134.

It frequently happens that persons are made defendants with others, for the mere purpose of excluding their testimony. In this case, if no evidence whatever be given against the person so improperly made defendant, he will be entitled to an acquittal immediately the plaintiff has closed his case, and may then be examined as a witness, on behalf of the other defendant; and in like manner, a defendant in trover, who had suffered judgment by default, was permitted by Lord *Kenyon*, to give evidence to prove his co-defendant (who pleaded) not guilty [1]. But a defendant who suffered judgment by default, in an action on contract, is not a witness for the plaintiff to charge the other defendant, he being interested, to make him liable to contribution [2]. So on an indictment against two for an assault, one submitted and was fined, and he also was admitted as a witness for the other [3]. But if there be the slightest evidence to charge one defendant, he cannot be a witness for

[153]

[1] Ward *v.* Haydon, 2 Esp. 552.

[2] Brown *v.* Brown, 4 Taunt. 752. Sed vide ante, 136.

[3] Rex *v.* Fletcher, 1 Stra. 633. Gilb. Law Ev. 134.

On this principle of necessity it has been said, that in informations on the stat. 15 Car. 2. against hunting deer, the statutes of conventicles, and the act of navigation, the informer shall be a witness, though part of the penalty goes to him. Gilb. Law Ev. 132. The only case which supports this doctrine is, that of *Jennings* v. *Hankey*, 3 Mod. 114; but the many cases collected by Mr. *Nolan*, in his note on *Rex* v. *Tilly*, 1 Stra. 315, fully establish the contrary position. In addition to these may be mentioned, the case of *Rex* v. *Blackmore*, 1 Esp. Cas. 95, where a witness was rejected on an information (under the statute) for concealing naval stores, as being the informer, and being entitled to a moiety of the penalty; though in *Rex* v. *Cole*, Peake's Cas. 218, Lord *Kenyon* held, a witness standing in a similar situation was not objectionable, because he had no absolute right to the penalty vested in him, as the court were not bound to inflict a pecuniary penalty. So in prosecutions on the stat. 21 Geo. 3, c. 37, for exporting machinery, and on stat. 23 Geo. 2, c. 13, for seducing artificers to go out of the kingdom, the informers have been held to be competent witnesses. *Rex* v. *Teasdale*, 3 Esp. Cas. 68; *Rex* v. *Johnson*, Willes, 425. And in cases of rewards for the apprehension of felons, &c. it was resolved by all the judges, that the person apprehending, being entitled to the reward, did not disable him from being a witness. *Vide* Leach's Cro. Cas. 353, note. It should be observed, that most of the statutes giving rewards, in such cases, were repealed by the stat. 58 Geo. 3, c. 70.

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the others; because the question, as to his liability, must wait the final event of the verdict, and the jury may, of their own knowledge, have further information of the fact, than what they collect from the witnesses in court. Thus where *A.* and *B.* being jointly sued in *assumpsit*, *B.* pleaded his discharge under a commission of bankruptcy, and on the trial proved his certificate; Lord *Kenyon* held, that he was not entitled to an immediate acquittal, but that the plaintiff, having made a case against him, was entitled to have the whole case submitted to the jury at the same time, and consequently, he could not be examined as a witness for the other defendant.

Raven et al. *v.* Dunning et al. Append. 3 Esp. Cas. 25, S. C.

If the plaintiff, in his declaration, state that the defendant, together with *A. B.* committed a trespass, this will not deprive the defendant of the testimony of *A. B.* unless evidence be given of his having been concerned in the fact, and that process had issued against him, and endeavours used to serve him with it.

Lloyd *v.* Williams, Cas. Temp. Hard. 123. Hill *v* Fleming, Ibid. 264.

Other cases, which at first sight seem to expose a witness to this objection on account of interest, are taken out of the rule by a counter interest in him, as where his interest in the event of the cause, supported by his evidence, is counteracted by an equal or greater interest, that it should be decided otherwise; for instance, if an indictment be preferred against a county for not repairing a bridge, and the only question be, whether it is in repair or not? men of the county are good witnesses; because it is equally desirable to every man that the bridge, for convenience of passage, should be repaired when it is necessary; as that the county should not be put to an unnecessary charge; so that they are perfectly indifferent, being equally concerned in both sides of the question (*o*).

[154]

Case of Peterboro' Bridge, cited 1 Ventr. 351. Gilb. Law Ev. 129. Rex *v.* Inhabitants of Wilts, 6 Mod. 307.

(*o*) By stat. 1 Anne, st. 1, c. 18, s. 13, inhabitants of the county &c. are made good witnesses, where the question is, whether private persons, &c. are obliged to repair?

Ch. III. s. 3. *Persons indifferent.*

On the same principle, the acceptor of a bill of exchange is a competent witness in an action against the drawer, to prove that he had no effects, and thereby prevent the necessity of notice to him; for though, by supporting the action against the drawer, he relieves himself from an action at the suit of the holder, he, at the same time, gives an action against himself at the suit of the drawer, in which the evidence he has given of the want of consideration will not avail him, but must be proved by another witness. But where a man was proved to be a partner with another, against whom an action was brought, it was holden that he was no witness to prove that the goods were sold to the other, as his servant, and on his sole credit, because the action which he gave against himself, was countervailed by a greater interest in getting rid of a moiety of the costs of the present action, to which he, as partner, would be liable; but this interest may be removed, and his competency restored, by a release from his partner, of any demand he may have upon him in consequence of the verdict (*p*).

Staples *v.* Okines, K. B. Sittings after East. Tm. 1795, MS. Esp. 332. S. C.

[155]

Goodacre *v.* Breame, Peak. N. P. 174.

Young *v.* Bairner, 1 Esp. Cas. 103.

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(*p*) In a subsequent case the court determined, that where it appears the witness is interested both ways, they could not nicely weigh on which side his interest preponderated; and therefore an endorser of a promissory note, to whom the drawer had given money to take it up, was held to be a competent witness for the defendant to prove it paid, being either liable to the plaintiff on the note, or to the defendant for the money had and received. His being also liable, in the latter case, to the costs incurred by the action, was considered as making no difference. *Birt v. Kershaw*, 2 East, 458. So where one partner drew a bill in the partnership firm to the order of the firm, and after it was accepted by the defendant, passed it to the plaintiff, who was a separate creditor of such partner for his separate debt; it was held, that in an action against the acceptor, he might call either partner to disprove the authority of the debtor partner to give the joint security, and that the bankruptcy of the debtor partner in the meantime, did not vary the question of competency. *Ridley* v. *Taylor*, 13 East, 175. And again in *Bond* v. *Bacon*, 5 Taunt. 183, it was held, that a person who had guaranteed the payment of a bill having become bankrupt, whereby he was discharged from the bill, was not incompetent

Ch. III. s. 3.
Persons having legal Title without beneficial Interest.

The evident policy of this rule of law, is to prevent those, who necessarily have a strong bias on their minds, from being put in a situation where their interest may induce them to depart from the truth; and, therefore, as we saw in a former instance, where the interest is strictly formed, arising from the situation in which they are placed, and they cannot be really benefited or injured by the event of the cause, it does not apply. Of this nature, is the case of a guardian in soccage, who may be examined on the behalf of his ward in an action brought by him [1]: so a grantee, executor, or devisee, who is merely a trustee, and has no beneficial interest; may, in cases where he is not a party on the record, give evidence of the grant to him [2], or, in support of the will, by proving the sanity of the testator; and the circumstance of his having acted in the trust will not render him incompetent [3]. But the case of a guardian on record [4], stands on a very different foundation, for he is really interested in the event of the suit, being liable to the costs, in case the verdict is against the infant whom he protects.

[1] Gilb. Law Ev. 123.

[2] Gross *v.* Tracy, 1 P. Will. 290.

[156]

Goodtitle dem. Forbes *v.* Welford, Dougl. 139.

[3] Lowe *v.* Jolliffe, 1 Black. 365. See also Bettison *v.* Bromley, 12 East, 250, and post, 155.

[4] Hopkins *v.* Neale, 2 Stra. 1026.

Persons thinking themselves interested where they are not so.

Where a right is claimed by a witness, which is supposed to interest him in the event of a cause, it should be considered before he is rejected on that account, whether it be a strict legal right, or one existing merely in his own imagination; for if the latter only be the case, it does not seem to fall within

petent by reason of his liability to costs in an action on the bill. But where an action was brought against the acceptor of an accommodation bill, the Court of Common Pleas held, that the drawer was not a witness to prove that the holder took the bill on an usurious consideration, and this on account of the superior interest he had in the case of the acceptor, for the holder, it was said, could recover against him only the contents of the bill, whereas the acceptor was entitled to recover against him both the amount of the bill and all damages he might sustain, including the costs of the action against himself. *Jones v. Brooke*, 4 Taunt. 464. For other instances, where a witness is admitted on account of his indifference, *vide* Digest at the end of this section, (B.) 5.

Ch. III. s. 3.
Persons thinking themselves, &c.

the rule[1]; thus it has been said, that a mere tenant at will may prove livery of seisin in his lessor, for his interest being so precarious that he cannot maintain an action for the possession, he is considered by the law as no more than the servant or bailiff of the freeholder. This instance can hardly now be considered as an authority, further than toward the establishment of the general principle, that the witness should have a real and not a mere ideal interest, before he is rejected; for that which the law formerly considered as a tenancy at will, is now, in most cases, converted into a tenancy from year to year, which being a permanent interest, is noticed by the law; and, therefore, such a tenant cannot be examined in support of his landlord's possession[2]; or to defeat the action by showing that he, and not the defendant in the cause, is the person in possession[3]. And it was long since said[4], that if a landlord had promised another person a lease of his land when recovered, such person could not be a witness; for this, though not an immediate vested interest, was nevertheless a right which might be enforced in a court of law in case a verdict should be procured on his evidence.

[1] Hale sup. Lit. 6. Gilb. Law Ev. 124.

[157]

[2] Doe dem. Forster v. Williams, Cowp. 621.

[3] Doe dem. Jones v. Wylde, 5 Taunt. 183.

[4] Per Twisden, 1 Mod. 21.

In these cases, the witness himself claimed a right; but in a case where the witness thought himself under an honorary engagement to make good a loss if it were not repaired by the event of the cause, though he knew he was not legally bound to do so, it was held sufficient to reject his testimony[5]. Lord C. J. *Mansfield*, however, in a late case which came before him, determined that this honourable feeling of the witness did not render him incompetent[6].

[5] Fotheringham v. Greenwood, 1 Stra. 129.

[6] Pederson v. Stoffles, 1 Camp. N. P. 144.

Of Interest acquired since the fact to be proved.

Another thing to be observed in the application of this rule of law is, that the interest must exist at the time when the fact which the witness is to prove happened, or be thrown upon him afterwards by operation

operation of law, or the act of the party who requires his testimony; for if after the event the witness become interested by his own act, without the interference or consent of the party by whom he is called, such subsequent interest will not render him incompetent. This exception to the general rule of law, is founded on true principles of justice, for otherwise it would always be in the power of the witness, and oftentimes in that of the adverse party himself, to deprive the person wanting his testimony of the benefit of it. Thus, though a person who knows the circumstances of a cause, lay a wager as to the event of it [1], or a prosecutor lay a wager that he shall convict a defendant [2], neither the individual in the one case, nor the public in the other, will be deprived of the right which they previously had to the testimony of the person so interesting himself.

Vide Bent v. Baker, 3 T. Rep. 27. [158]

[1] Barlow v. Vowel, Skin, 586.

[2] Rex v. Fox, 1 Stra. 652.

Of Interest removed at the Time of the Trial.

Not only must the interest exist at the time of the transaction, but it must continue to the time of the trial; and, therefore, when a witness is interested by being answerable to one of the parties; or will have a demand on that party in case the cause be unsuccessful; a release from the party to the witness, or from the witness to the party, as the case may require, by taking away his interest, restores his competency; and, in these cases, if the party who wishes to call the witness tender a release to him, and he refuse to accept it; or the witness having a claim tender a release on his part, which is refused, he may be examined as a witness; for neither the witness himself, nor the party in the cause, can exclude his testimony, by an objection on account of his interest, when that interest has in truth been removed (*q*).

Goodtitle dem. Fowler v. Welford, Dougl. 139. Bent v. Baker, ub. sup. [159]

I shall

(*q*) In the case of *Goodtitle* dem. *Fowler* v. *Welford*, a person who was devisee of a reversion in copyhold premises was called to substantiate the will, by proving the sanity of the testator, he had

Ch. III. s. 3. *Against his own Interest.*

I shall conclude this section by observing, that a man who is interested in the event of a suit, is objectionable only when he comes to prove a fact consistent

[160]

had surrendered his reversion to the use of the heir at law, but the heir had refused to accept it, yet the court held him to be a competent witness; and Mr. Justice *Ashhurst* said, "every objection of interest proceeds on the presumption that it may bias the mind of the witness; but that presumption is taken away by proof of his having done all in his power to get rid of his interest."

But in *Holdfast* dem. *Anstey* v. *Dowsing*, 2 Stra. 1253, where an annuity of 20*l.* per annum was given by will to *Elizabeth*, the wife of *John Hales*, for life, to her separate use; and also a legacy of 10*l.* each to *John Hales* and his wife, to which will *John Hales* was a subscribing witness; the Court of King's Bench held *Hales* could not be a witness, though the devisee had tendered the two legacies of 10*l.* each. The chief justice, in delivering the resolution of the court, said, "If the tender would be equal to payment of the two money legacies, as it is not; yet the annuity charged upon the estate devised, would still subsist: and further he observed, that the true time for ascertaining his *credibility* was the time of attestation, and if then interested he could not afterwards be a witness."

Lord *Mansfield*, in delivering the opinion of the court, in *Windham* v. *Chetwynd*, 1 Burr. 417, &c. commented much at length on the word *credible*, as applied to witnesses in the statute of frauds, on which the decision of the court, in the last case, in some measure proceeded; and observed, "that the word was never used as synonymous to *competent*; but when applied, it presupposes the evidence given. After the competence of a witness is allowed, the consideration of his credibility arises, and not before; and the only consideration, in determining his competency, must be, whether he was competent at the *time of his examination?*" His lordship said, "that the decision of the court in that case went rather upon the particular circumstances of it, than upon the general proposition, and that as to the annuity there was no release. There could be no payment or tender without the interposition of a court of justice, because the value depended upon uncertain estimation, but no attempt had been there made towards paying or tendering the value of the annuity." It is impossible to convey, by any abridgment of the case of *Windham* v. *Chetwynd*, the substance even of the very elaborate and elegant judgment pronounced by Lord *Mansfield* on that occasion; and the question here made having been settled by legislative interference, in consequence of the decision in *Anstey* v. *Dowsing*, it becomes unnecessary to state the case at length.

For by stat. 25 Geo. 2, c. 6, it is enacted,

1. That any beneficial devise, legacy, estate, interest, gift or appointment, made to any person being a witness, after 24th June 1752,

sistent with his interest; for if the evidence he is to give be contrary to his interest, he is the best possible witness that can be called, and no objection can be made to him by the party in the cause[1]. In this case, however, he might formerly have objected to be examined, because his evidence might subject him to future inconvenience; but of this hereafter.

Ch. III. s. 3. *Against his own Interest.*

[161]

[1] Oxenden v. Penrice, Salk. 691.

1752, to any will or codicil, shall be void, and such person shall be admitted as a witness.

2. That any creditor attesting any will or codicil, made or to be made, by which his debt is charged upon land, shall be admitted as a witness to the execution of such will or codicil, notwithstanding such charge.

3. That any person who had attested, or who should attest any will or codicil, to whom any legacy or bequest was or should be given, having been paid or released, or upon tender made having refused to accept such legacy or bequest, should be admitted as a witness to the execution of such will or codicil.

4. That any legatee, having attested, or who should attest a will or codicil, and who should have died in the life-time of the testator, or before he had received or released his legacy, should be deemed a legal witness to such will or codicil.

After which there is a proviso, that the credit of every such witness, in any of the cases before mentioned, shall be subject to the consideration of the court and jury before whom he shall be examined, or the court of equity in which his testimony shall be made use of, in like manner as the credit of witnesses in all other cases ought to be considered of and determined.

In *Bettison* v. *Bromley*, 12 East, 250, one of the subscribing witnesses to the will was the wife of one of the executors who had proved the will and acted under it. An issue was directed to try the sanity of the testator, and a case being saved, it appeared that the witness's husband took no beneficial interest under the will; on which the court held, that she was a *credible* witness within the statute of frauds, and a competent witness on the trial. The above stat. of 25 Geo. 2, does not appear to have been adverted to in the argument.

DIGEST OF CASES,

AS TO THE INTEREST OF WITNESSES.

(A.) *In what Cases Corporators and others are Witnesses on public Questions.*

Ch. III. s. 3. *Corporators and others on public Questions.*

THE general rule as to this is, I believe, correctly stated in the preceding section; and it was well observed by *Scroggs*, C. J. 2 Lev. 231, that it cannot be a general rule that members of corporations shall be admitted or refused to be witnesses in actions for or against the corporation, but every case shall stand upon its own circumstances; to wit, whether their interest be so valuable, as it can be presumed it may occasion partiality in them, or not; with this preliminary observation, I shall refer to a few of the ancient cases, and most of the more modern ones.

1. In the case of the *Corporation of London* for water-bailage, 1 Ventr. 351, an action being brought by the mayor and commonalty of London, for tonnage on wine imported by the defendant; freemen of London were offered as witnesses for the plaintiffs; and on objection being taken to them by the defendant's counsel, because they were parties (the commonalty comprehending all the freemen), and likewise interested, *Scroggs*, *Dolben*, and *Raymond*, were of opinion that they were witnesses; but
[162] *Jones*, J. was of a contrary opinion; and the plaintiff's counsel, having other witnesses, did not examine them. But in another case, where the question as to right of the city to toll on coals came in question, it appearing that the mayor and sheriffs had the toll for the corporation at large, and that no individual citizen was benefited by it, the freemen were held good witnesses. *Rex* v. *Mayor, &c. of London*, 2 Lev. 231. And so in the case of *King* v. *Carpenter*, 2 Show. 47, all the judges, except *Jones*, held them good witnesses in such cases.

2. Upon a trial at bar, of an issue directed out of Chancery, whether all the manor of S. H. was within the county of Stafford? exception was taken to some of the witnesses, who were called to prove the manor-house within the county of Salop, because they were of that county themselves; but it was ruled that any person of the county, if he was not within the hundred where the

the manor was, might be a witness: for as to the county taxes, every hundred pays its proportion; but as to hundreds, there are particular charges. But it being afterwards proved that there was a general tax in each county, for maintenance of the suit, no one who was charged thereto, was permitted to be a witness. *The County of Salop* v. *the County of Stafford*, 1 Sid. 192. By stat. 8 Geo. 2, c. 16, s. 15, hundredors are made witnesses for the hundred in actions against them; on the statute of *hue and cry*, and by stat. 1 Anne, st. 1, c. 18, s. 13, inhabitants of any county, division, &c. are made good witnesses in indictments for not repairing *bridges*, where the question is, whether the county, &c. or a private person is liable to repair? Surveyors of the highways in all cases relative to the execution of the highway act, and inhabitants on trials for offences committed against it, are made witnesses by the express provisions of the statute. *Vide* stat. 13 Geo. 3, c. 78, s. 69. 77. The like provision is made in the case of inhabitants as to offences committed against the general turnpike act. Vide 13 Geo. 3, c. 84, s. 74. By stat. 3 & 4 W. & M. c. 11, in all actions to be brought in the courts of Westminster, or at the assizes, for money mis-spent by churchwardens, the evidence of parishioners, other than such as receive alms, shall be taken and admitted; and by stat. 27 Geo. 3, c. 29, parishioners are made competent witnesses in all cases where penalties not exceeding 20*l.* are given to the parish; and lastly, by stat. 54 Geo. 3, c. 170, s. 9, it is enacted, that no inhabitant or person rated or liable to any rates, or cesses of any district, parish, township or hamlet, or wholly or in part maintained or supported thereby, or holding or exercising any office thereof or therein, shall before any court or person or persons whatsoever, be deemed or taken to be by reason thereof an incompetent witness for or against such district, parish, township or hamlet, in any manner relating to such rates or cesses, or to the boundary between such district, &c. and any adjoining district, &c. or to any order of removal to or from such district, &c. or concerning any bastards chargeable or likely to become chargeable, &c. to such district, &c. or to the recovery of any sum or sums of money for the charges and maintenance of such bastards, or to the election or appointment of any officer or officers of any such district, &c. any law, &c. to the contrary in anywise notwithstanding.

3. Before the making of the above statutes, it was held, that at common law, where a person *is not rated*, though rateable, he is a witness. *Case before Burland, B. at Salisbury*, cited 4 T. Rep. 20.

4. On an appeal against a poor rate, because certain persons were not rated; that a parishioner, who was liable to be rated, but

Ch. III. s. 3. *Corporators and others on public Questions.*

but not in fact rated, was a competent witness to prove the rateability of the persons omitted. *Rex* v. *Prosser*, 4 T. Rep. 17.

5. So that an inhabitant, who was not rated, was a competent witness on an appeal between his own parish and another, *Rex* v. *Little Lumley*, 6 T. Rep. 157; though left out of the rate for the mere purpose of making him a witness. *Rex* v. *Inhabitants of Kirdford*, 2 East, 559. But where his son was rated for the property held by him he was deemed incompetent. *Rex* v. *Killerby*, 10 East, 292.

6. So such person was considered a good witness to extend the boundary of his parish, on a question as to the line of boundary between two adjoining parishes. *Deacon* v. *Cooke*, Taunton Spr. Assiz. 1789, cited Ibid. 562. Since the passing of the last statute it has been holden, that on a question whether certain lands belonged to an individual or to certain trustees in aid of the poor rates, inhabitants were admissible witnesses. *Meredith* v. *Gilpin*, 6 Price, 246.

7. In trespass, the plaintiff claimed as lessee of the corporation of Kingston, who as lords of the manor had approved the land in question, and it was ruled that a freeman could not be a witness to prove sufficiency of common left, because the rent must be reserved to the use of the corporation. *Burton* v. *Hinde*, 5 T. Rep. 174.

8. The question being, whether the plaintiff was entitled to be elected common-council-man of Appleby? the defendant attempted to disqualify him, by setting up two qualifications which he had not, viz. a burgage tenure, and being an inhabitant; and to prove this, called one who was an inhabitant, but who had not a burgage tenure. It was objected that he was no witness to narrow the right, and confine it to burgage tenants and inhabitants, having one of these qualifications himself, and therefore so far interested, as he was nearer the right he set up than other persons. [163] But the court said, there was a necessity of allowing such people in a question of this nature, since they must best know the right; besides he was in effect a witness against himself, by saying, though I am an inhabitant, yet I have no right to be chosen, because I have not a burgage tenure. *Stevenson* v. *Nevinson*, 1 Stra. 583; 2 Lord Raym. 1353, S. C.

9. Upon information, in nature of *quo warranto*, the question on which the defendant's title turned was, whether the former mayor had a right to name two elisors to return a jury, if the town clerk, who might nominate one, was absent or refused? The second elisor nominated by the mayor was called as a witness, and it was objected to his competency, that he having acted under

under such a nomination was liable to an information, and therefore could not be examined. The judge allowed the objection; but, on motion for new trial, the court thought it went only to his credit, and granted a new trial. *Rex v. Robins*, 2 Str. 1069.

10. But in the case of the *Company of Carpenters, &c. v. Hayward*, Dougl. 360, where an action was brought by a corporation on a custom, a stranger who had acted in defiance of the custom was held to be an incompetent witness.

11. On the trial of an issue taken on the return to a *mandamus* to admit a man to his freedom, as the eldest son of a freeman, the father was held to be a good witness to prove the custom for sons of freemen to become free. *Rex v. Mayor and Burgesses of Oakhampton*, 1 Wils. 332.

12. *Rex v. Phillips and Archer*, at Camb. per *Lee*, C. J. Bul. N. P. 289, the question being, whether the defendants had a right to be freemen, though it appeared there were commons belonging to the freemen, yet an alderman was permitted to prove them not freemen, *it appearing that none but aldermen were privy to the transactions, in making persons free.*

13. In some cases, freemen interested as such, have been deemed competent when disfranchised, as where the company of Sadler's brought debt on statute 1 Jac. c. 22, against a man, to recover a forfeiture, for making saddles insufficiently, three of the company being disfranchised, and declaring on the *voir dire*, that they had no assurance of being restored, were admitted as witnesses. *Saddlers Company v. Jones*, 6 Mod. 165. But where a freeman was called, and, on an objection to his testimony, the corporation produced a judgment in the mayor's court, whereupon a *scire facias* being awarded, and two *nihils* returned, he was adjudged to be disfranchised; the man saying that he was not summoned, and knew nothing of the disfranchisement, *Holt*, J. C. would not permit him to be examined. *Brown v. Corporation of London*, 11 Mod. 225. [164]

14. On a prescription of a right of common, as appurtenant to the house of *A.*, *B.* who has a similar house, is a good witness; but if it be claimed by custom, as appurtenant to all houses similar to that of *A.*, *B.* would not be a witness, because the record would, in this case, be evidence of his right. Bul. N. P. 283. Vide *John v. Fitzhugill*, Append. But where an action on the case was brought by a commoner claiming a prescriptive right, against an owner of adjoining land for not repairing his fences, and the question was, whether he was liable to such repairs? it was held that other commoners could not be witnesses, because by establishing such a liability they increased the value of the common.

Ch. III s. 3. *Servants and Agents.*

common. *Anscomb* v. *Shore*, 1 Taunt. 261. So where an issue was directed to try whether the inhabitants of *A.* were immemorially bound to repair a chapel, the owner of the inheritance is not a competent witness, although he has leased his estate and is not rated, for he has an interest in discharging the inheritance from a permanent burthen. *Rhodes* v. *Ainsworth*, 1 B. & A. 87.

(B.) *Servants and Agents.*

1. A BANKER'S clerk, having paid more than was due on a bill, was held a good witness in an action brought by the banker to recover back the surplus; and this from *necessity*. *Martin* v. *Horrel*, 2 Stra. 647. So where a person generally intrusted his son to receive money for him, who did so, and delivered it to the defendant; in an action of trover to recover it, the son was held a good witness. *Anonymous*, Salk. 289.

2. The plaintiff's servant having given money of his master's to the defendant for illegal insurances in the lottery, was admitted a witness for his master, *on being released by him*. Note, this was not the case of an ordinary transaction in business, and therefore the release appears to have been necessary to make him a witness. *Clarke* v. *Shee*, Cowp. 199.

[165]

3. *A.* sells goods to *B.* and afterwards *C.* desires *D.* to pay *A.* and promises to repay him. *D.* pays *A.* and afterwards *B.* allows the money to *D.* in account. In an action against *C.*, *B.* was called to prove the account, (it amounting to payment), and it was objected that the contract being originally only between *A.* and *B.*, *B.* was still liable to *A.* and was therefore swearing to discharge himself; but the chief justice said, he would allow him to be a witness to prove the payment as a servant to *C.* *Brownson* v. *Avery*, 1 Stra. 506.

4. A factor, who was to have a poundage, *according to the amount of the sale*, was held a good witness to prove the contract in an action by his principal. *Dixon* v. *Cooper*, 3 Wils. 40. And, in like manner, a factor, who was to have all above a certain sum, was admitted to prove a contract above that sum, by *Heath* and *Rooke*, J. (dissent. *Eyre*, C. J.) for this was still in the ordinary course of business. *Benjamin* v. *Porteus*, 2 H. Black. 590.

5. *A.* having received money as for the use of *B.* was admitted, in an action by *B.* for the money, to prove that he was agent; not on the ground of necessity, but because he stood indifferent in point of interest between the parties, being liable either to pay

pay the money received to the plaintiff, or to refund it to the defendant. *Ilderton* v. *Atkinson*, 7 T. Rep. 480. So the captain of an Indiaman, having borrowed money of the plaintiff, was permitted to prove it borrowed for the use of the ship, in an action against the owners, on the principle that he was indifferent between the parties, being in all events answerable to one or the other. *Evans* v. *Williams*, 7 T. Rep. 481, note (*c*). So the master of a ship for which the plaintiff had supplied provisions, was admitted to prove that the defendant was liable as being owner. *Rowcroft* v. *Basset*, Sitt. at Guildhall, after Hil. T. 1802, cor. *Le Blanc*, J. MS. And where an endorser of a note had received money from the drawer to take it up, it was held that he was competent to prove, in an action against the drawer by an endorsee, that he had satisfied the note, being either liable to the plaintiff on the note, if the action were defeated, or to the defendant for money had and received, if the action succeeded. *Birt* v. *Kershaw*, 2 East, 458. But where a bill was accepted for the accommodation of the drawer, the Court of Common Pleas held that he was not a competent witness to prove it usurious, having a greater interest to defeat the action on account of the costs he would be liable to pay the acceptor, than to support it, whereby he would be liable to the bill without costs. *Jones* v. *Brook*, 4 Taunt. 464. *Vide ante*, 150, note (*p*).

6. *A.* delivered South Sea bonds to *B.* from whom they were stolen: when presented for payment of the interest, they were stopped by *C.* (a clerk), against whom *D.* the holder, brought trover, which the company defended, on having a bond of indemnity from *B.* This bond prevented *B.* from being examined as a witness in the action against *C.* *Ball* v. *Bostock*, 1 Stra. 575.

But *A.* having afterwards brought trover against *D.*, *B.* was held a good witness in such action. Ibid.

7. In an action brought against the master for an injury, by the negligence of the servant, he is not a witness for his master until released. Therefore a bailiff, to whom a warrant is directed, cannot be examined for the sheriff in an action for escape. *Powell* v. *Hord*, 1 Stra. 650; 2 Lord Raym. 1411. Nor a servant, whose business it is to take care of the pipes of the New River Company, through a defect of which the plaintiff met with an accident. *Green* v. *New River Company*, 4 T. Rep. 589. But if the master release the servant in such case, he is a good witness. *Jervis* v. *Hayes*, 2 Stra. 1083. [166]

8. So in an action for sinking a barge, on board of which the plaintiff had a cargo of corn, the master is a good witness when released by the plaintiff. *Spitty* v. *Bowens*, Peake's N. P. Cas. 53.

Ch. III. s. 3. *Servants and Agents.*

9. But without such release he is not; and, in like manner, in an action on a policy on goods, on board a ship, the master and owner was held not a competent witness to prove the ship seaworthy, without a release by the plaintiff. *Rotheroe* v. *Elton*, Peake's N. P. Cases, 84. *Fox* v. *Lushington*, Ib. note.

10. So in an action on a policy of insurance, stating a loss by the barratry of the master, he cannot be a witness for the underwriters to prove the deviation made with the consent of the owners, unless released by the defendant; for if the plaintiff succeeds on his barratry, he is answerable to the underwriters. *Thompson* v. *Bird*, 1 Esp. Cas. 339.

11. A servant for beating whom his master has brought trespass, may be a witness to prove the beating. *Deal* v. *Harding*, 1 Stra. 595, and *Lewis* v. *Fog*, 2 Stra. 944, contrary to *Dunstey* v. *Westhouse*, 1 Stra. 414, which is over-ruled; and, in like manner, the plaintiff's daughter being seduced, is a good witness to prove the seduction, *Cock* v. *Wortham*, 2 Stra. 1054; but she cannot give evidence of a promise of marriage to increase the damages.

12. On an information for importing teas from a country in which they were grown, contrary to the act of navigation, the defendant called the master of the ship; but his evidence was rejected, though there had been no information against the ship, because by the statute it is forfeited, and he would be answerable over to the owners. *Fuller* v. *Jackson*, Bunb. 140. In like manner, in an information for importing India silks, the master of the ship was rejected, because he being an abettor, would be liable to a penalty of 500 *l.* *Rickson* v. *Sandforth*, cited Ib.

So in an information for importing brandy in unsizable casks the master of the ship was rejected, being liable to a penalty of 100 *l.* for breaking bulk. *Spong* v. *Fasting*, Bunb. 203.

[167]

Note, It is observed in the report of the case of *Fuller* v. *Jackson*, that this objection never was allowed before; and a case is mentioned to have happened at the same sittings, where on the like objection being made to the master of a cart (which by stat. 6. and 8 Geo. 1, is forfeited) for running goods, it was disallowed.

13. In actions by informers for selling coals without measuring by the bushel, the servants are witnesses for the master, notwithstanding 3 Geo. 2, inflicts a penalty upon them for not doing it; though *Eyre*, J. did on that account, in two or three instances, refuse to receive them. Per *Lee*, C. J. in *E. I. Comp.* v. *Gosling*, Bul. N. P. 289.

(C.) *Witnesses in Cases of Bankruptcy and Insolvency. Vide* (E.) 8.

In cases of bankruptcy, it is the obvious interest of the creditor, to increase the divisible fund of the bankrupt, and the bankrupt himself also has the same interest, because he thereby increases his own allowances; for this purpose, therefore, neither are admitted as witnesses during the continuance of that interest; and, by the policy of the bankrupt laws, the bankrupt himself cannot at any time give evidence to support his own commission.

1. Agreeable to these principles, it has been held, that upon an issue out of Chancery, to try whether a bankrupt has lost money by gaming, a creditor of the bankrupt cannot be examined as a witness to prove the fact of his having so lost money, for he thereby increases the divisible fund, by depriving him of his allowance. *Shuttleworth* v. *Bravo*, 1 Stra. 507.

2. But in an action against a man who pleads his discharge under an insolvent act, another creditor, who is no party to the cause, may be admitted to prove the defendant not within the description of the act; for he is not immediately interested, nor will the record be evidence for him in any future action of his own. *Norcot* v. *Croot*, 1 Stra. 650.

3. Neither can a creditor prove the act of bankruptcy, for he is interested to support the commission, (*Koopes* v. *Chapman*, Peake's Cas. 80,) unless he release his debt to the assignees, in which case he may, though the bankrupt himself is party to the action in which the commission is disputed. Ib.; *Ambrose* v. *Clenden*, [168] Cas. Temp. Hard. 267. A creditor, who has sold his chance of recovering a debt, and whose interest is thereby removed, is a good witness to prove the petitioning creditor's debt, in an action by the assignees, (*Granger and another*, assignees, v. *Furlong*, 2 Black. 1273;) or to increase the fund (*Heath* v. *Hall*, 4 Taunt. 362.) And one who has not proved under the commission, is competent to support it (though not to increase the fund) without giving any release. But a *petitioning creditor* cannot be a witness to prove the regularity of the commission though he does release, for he still remains liable on his bond. *Green* v. *Jones*, 2 Campb. 411.

4. The bankrupt himself cannot, in any case, be permitted to prove his own bankruptcy, the petitioning creditor's debt, or his trading, though he has obtained his certificate, and released his surplus and allowance. *Field* v. *Curtis*, 2 Stra. 829. *Chapman* v. *Gardiner*, 2 H. Black. 279. And if a joint commission issue

Ch. III. s. 3. *In cases of Bankruptcy and Insolvency.*

against two, one cannot be called to prove an act of bankruptcy committed by the other. *Flower* v. *Herbert*, cited 2 H. Black. 279. But if the assignees prove an act to have been committed by the supposed bankrupt, which is equivocal, he may be called as a witness by the other side to explain the act, and show that he did not thereby become a bankrupt. *Oxlade* v. *Perchard*, 1 Esp. Cas. 287.

5. As a bankrupt cannot increase his fund while interested, it follows that he cannot, in any case, be examined for his assignees, while uncertificated; but after certificate, he may release his allowance and surplus to his assignees, and thereby be made a competent witness to increase the fund, for he has then no interest in it. *Butler* v. *Cooke*, Cowp. 70. So if his allowance has been paid, he is competent, for he is not bound to refund. *Russel* v. *Russel*, 1 Brown, 269. But where a second commission has issued, he cannot be a witness to increase the fund under it, till he has actually paid 15 *s.* in the pound; for his future effects are not discharged by his certificate till that is paid, and therefore he is still interested to increase his fund, notwithstanding his certificate and release. *Kennet* v. *Greenwollers*, Peake's Cas. 3.

6. But to decrease his estate, as by proving in an action against *A.* that he was the debtor, a bankrupt is a good witness, though he has not obtained his certificate. *Walker* v. *Walker*, cited Cowp. 70.

(D.) *Of Witnesses on Indictments for Forgeries.*

1. The name of *A.* being forged to a receipt, he was held an incompetent witness to disprove the hand-writing on an indictment for the forgery. *Rex* v. *Russel*, Leach's Cro. Cas. 10.

2. So where a person, having a bill of exchange in his possession, endorsed a receipt in a fictitious name on it, the acceptor was held not to be a competent witness to prove the payment, without a release from the endorsee. *Rex* v. *Taylor*, Ib. 255.

3. So the person whose hand-writing was forged to a letter of attorney to receive stock, was held incompetent to disprove his [169] hand-writing. *Rex* v. *Rhodes*, 2 Stra. 728. Note, in *Rex* v. *Parr*, Leach's Cro. Cas. 487, it is said, that the stockholder was admitted in that case (which was an indictment for personating him to receive a dividend) *to prove the amount of the stock he had and the dividend due to him.* And in a late case of a prosecution for the forgery of a promissory note, on which there was an endorsement, in the prisoner's hand-writing, that a year's interest had been paid, the person

person whose name was forged having been admitted to prove that he had never paid the money mentioned in the receipt, and a case being reserved on this point, some of the judges thought, that as the forgery had been proved before, the witness was admissible to prove this fact, but the majority thought otherwise, because the fact was not perfectly collateral, but might conduce to the proof of the forgery. *Crocker*'s case, 2 Bos. & Pull. N. R. 87.

4. So the assignee of a certificate to a navy bill, whose name is charged to have been forged to a receipt for the money, is not a competent witness. *Rex* v. *Thornton*, Ib. 723.

5. In like manner, on an indictment for forging a seaman's will, an executor named in a subsequent will, is not a witness to prove the first a forgery. *Rex* v. *Rhodes*, Ib. 29.

6. But where a bank-note was forged in the name of one of the cashiers, he, not being personally chargeable, was held to be a witness to prove the forgery, though he had given security for the faithful discharge of his duty. *Rex* v. *Newland*. Ib. 350.

7. In like manner, where *A.* remitted a bill to *B.* (which was made payable to him) for the purpose of paying the debt of *A.* to a third person, and not on his own account, *B.* never having received the bill, and having no interest in it, was deemed a competent witness to prove a forgery of his name to an acquittance on the back. *Rex* v. *Sponsonby*, Ib. 374.

8. And where a banker had paid a forged draft, and being afterwards convinced of the forgery, had struck the money out of his account with the person whose name was forged, the supposed drawer was also admitted to be a witness. *Rex* v. *Usher*, Ib. 57.

9. So where a man was indicted for forging a receipt, and the person whose name was forged had recovered the money from the prisoner, he was admitted a witness per *Willes*, C. J. *Wills*'s case, Bul. N. P. 289.

10. Persons interested may in this, as in other cases, be made witnesses by a release; as the supposed obligor in a bond, may be a witness when released by the obligee, (*Dr. Dodd*'s case, Leach's Cro. Cas. 184;) or the acceptor of a bill, when released by the holder (*Taylor*'s case, *ante*, pla. 2.) and the like.

11. As was before stated, the case of an indictment for forgery is considered as an anomalous case; it has therefore been held that the rule does not apply to civil actions, but that in such cases the party whose name has been forged may be called to prove the forgery without any release. *Hunter* v. *King*, 4 Barn. & Ald. 209.

Ch. III. s. 3. *Persons answerable over.*

(E.) *Of Persons who may be answerable over, or have themselves contracted.*

[170]

WHERE a person has entered into a contract with another, his ability to fulfil which is afterwards disputed by a third person in a court of justice, and the consequence of a recovery by the third person, would be an immediate right in the person with whom the contract was made to recover against the other who contracted with him, it follows that such contractor cannot be examined as a witness in his behalf, till released by him:—Therefore,

1. If a vendor of an estate covenant for the title, or warrant the premises, he cannot be a witness to support the title of the vendee in an action against him by a third person, for the premises, (2 Roll's Abr. 685); but a vendor who does not covenant for the title, or enter into any warranty, is a good witness. *Busby* v. *Greenslate*, 1 Stra. 445. If *A.* sell a horse to *B.* with a warranty of soundness, and *B.* afterwards sell to *C.* with a like warranty, *A.* is a witness for *B.* in an action by *C.* on the warranty: for the horse might be sound when sold by *A.* though unsound when sold by *B.*; so that the liability of *A.* is not a necessary consequence of the recovery against *B.* *Briggs* v. *Crick*, 5 Esp. Cas. 99.

2. In a covenant for rent upon a lease by *A.* to *B.* the defendant pleaded, that *C.* and *D.* being seised in fee, before the demise in the indenture, demised to *E.* who entered upon defendant's possession. The replication admitted the seisin of *C.* and *D.* but stated that they demised to plaintiff before they demised to *E.*, and *C.* was held a competent witness to prove the point in issue, for the verdict could not be given in evidence in any action which might afterwards be brought either by or against him. *Bell* v. *Harwood*, 3 T. Rep. 308. But if two persons are contending for the possession, *who are to pay rent in different rights*, there the landlord could not be admitted a witness to prove the demise. Per *Buller*, Ib.

3. If *A.* agree to indemnify *B.* (a candidate at an election) against a moiety of the expences, he cannot be a witness for *C.* (an agent of *B.*) in an action against him for expences incurred in the election, for he is liable to a moiety of the costs under his indemnity. *Trelawney* v. *Thomas*, 1 H. Black. 303.

Persons who are *jointly* liable with the party to the cause, cannot be witnesses to defeat the demand, though not made parties, if they are thereby benefited:

4. Thus a man, who was proved to be a partner with the defendant,

fendant, was not permitted to be examined for the purpose of proving that he was solely liable, and that the defendant was his servant, because by that evidence he discharged himself from the costs to which he was liable. *Goddacre* v. *Breame*, Peake's Cas. 174. But if his supposed partner had released him from those costs, he might have been a witness; and therefore where *A.* being sued, pleaded that the contract was made by him jointly with *B.* which fact was traversed, *B.* on being released by *A.* was permitted to prove it. *Young* v. *Bairner*, 1 Esp. Cas. 103. But if two persons jointly contract, and after the death of one an action is brought against the survivor, the next of kin of the deceased contractor may be called as a witness for the plaintiff, to prove the joint contract; for the same evidence which fixes the debt on the survivor, creates a charge against himself for a moiety. *Burton* v. *Burchall*, B. R. Hil. 43 Geo. 3. Note. In this case there was no other witness. If to an action brought by *A.* alone, it be objected that the name of *B.* is used as a partner with *A.* and therefore that the action in the name of *A.* alone cannot be supported, *B.* may be called as a witness to prove that in fact he has no interest. *Parsons* v. *Crosby*, 5 Esp. Cas. 199.

5. Where several partners of a ship by deed appointed a ship's husband, and he laid out a sum of money in insuring the whole ship, and brought several actions against each for the whole money, the defendant in one action was held to be incompetent to prove, on the trial of the other, that the money was laid out against the consent of the owners. *French* v. *Backhouse*. *Same* v. *Fulston*, 5 Burr. 2727.

6. In an action against an administrator, a co-obligor in a bond to the ordinary under the statute of distribution, was held to be competent to prove a tender of the debt, for he was not interested in that cause, and the *bare possibility* of his being liable to an action in a certain event, was no objection to his testimony. *Carter* v. *Pearce*, 1 T. Rep. 163.

7. No person who has made himself liable in a secondary degree, as bail, the guardian of an infant on record (*Clutterbuck* v. *Lord Huntingtower*, 1 Stra. 506,) the *prochein amy*, or in short any person who has undertaken to pay the costs, (*Hopkins* v. *Neale*, 2 Stra. 1026, Cas. Temp. Hard. 202,) can be examined as a witness for the person on whose behalf he has made himself liable; but in these cases the court will, on motion, permit another person to be substituted for him, in order that he may be a witness.

8. In an action by the obligee of a joint and several bond against one of the obligors, who was surety for another who had become bankrupt, and against whose estate the plaintiff had proved his

Ch. III. s. 3. *Persons themselves liable, &c.*

debt, and thereby relinquished his action against him; by sect. 14 of stat. 49 Geo. 3, c. 121, the bankrupt, not having obtained his certificate, and therefore being liable to be sued by his surety in case of a verdict by the plaintiff against him, is not a competent witness to prove payment. *Townend* v. *Dawson*, 14 East, 565.

(F.) *Of Persons themselves liable charging others, vide ante* (B.); *or coming to claim Property in themselves.*

1. Persons who are primarily liable, are never permitted to charge others by their evidence until released, unless in cases where they stand indifferent; and therefore where a workman has been employed to do work about the house of *A.* and he afterwards brings an action against another workman, who contracted to do the whole for a certain sum, *A.* cannot prove this case till released by the person so bringing the action. *New* v. *Chidgy*, Peake's Cas. 98.

2. But a person who gives a bribe to another, at an election of members of parliament, is a competent witness to prove the fact in an action on the statute, though he thereby discharges himself from the penalty; for by this provision the legislature intended he should be a witness. *Mead* v. *Robinson*, Willes, 422. So the person bribed is, in like manner, a witness, *Bush* v. *Rawlins*, before *Foster*, J. at Abingdon Sum. Assizes, cited Cowp. 199, and reported by the name of *Bush* v. *Ralling*, Say, 289. This doctrine was afterwards doubted, (vide *Edwards* v. *Evans*, 3 East, 451,) but in a subsequent case the court confirmed it; and held, that even though the witness intended to use the verdict for his own indemnity, yet that he was a witness of necessity. *Howard* v. *Shipley*, 4 East, 180.

[172]

3. A man who has been arrested, and suffered by the sheriff to escape, is a competent witness to prove the escape, for he is not discharged by a recovery against the sheriff. *Cass* v. *Cameron*, Peake's Cas. 124. *Rex* v. *Warden of the Fleet*, Bul. N. P. 67. So a person rescued is a witness for the defendant in an action against him for the rescue. *Wilson* v. *Gary*, 6 Mod. 211. But where *A.* brought trespass against the sheriff, for taking his goods under an execution against *B.* the court held that *B.* was not a witness to disprove an assignment of them from himself to *A.* under which assignment *A.* claimed. *Bland* v. *Ansley*, 2 Bos. & Pul. N. R. 331.

4. In

Ch. III. s. 3. *Persons themselves liable, &c.*

4. In an action against the acceptor of a bill of exchange, brought by the endorsee, the defendant offered to call the endorser to prove that he endorsed the bill to the plaintiff to receive as agent for him, and that he was still beneficially entitled to it, but the court held him an incompetent witness, as coming to prove a right in himself, which would be benefited by defeating the plaintiff's action. *Buckland* v. *Tankard*, 5 T. Rep. 578.

5. In an action of trover for a horse, a witness may be called to prove that the plaintiff agreed to his taking the horse as a security for money due to him from the plaintiff, and selling it if the money was not paid on a day certain, and that the money not being paid the witness accordingly sold the horse to the defendant; for the verdict to be obtained on his evidence will not avail him in an action to be brought against him by the plaintiff. *Nix* v. *Cutting*, 4 Taunt. 18.

6. Where two persons have joined in a promissory note, and the payee brings an action against one only, he may call the other to prove the signature of the defendant. *York* v. *Blott*, 5 M. & S. 71.

SECTION IV.

Of Persons incompetent by Reason of their Relation to the Parties.

Ch. III s. 4. *Husband and Wife.*

In the preceding sections, our attention was confined to persons whose evidence is excluded on account of imbecility, crime, or interest. We are now to consider those who stand in a different situation, and are excluded not by reason of any disability, but on account of higher duties, either domestic or public, binding them to silence.

It has been before mentioned, that no one can be a witness for himself; and it follows of course, that husband and wife, whose interests the law has united, are incompetent to give evidence on behalf of each other; or any other person whose interests are the same (*r*): and the law, considering the policy

[173]

Bul. N. P. 286.

(*r*) Therefore, if two persons are jointly indicted for an assault, the wife of one cannot be admitted as a witness for the other. *Rex* v. *Frederick and Tracey*, 2 Stra. 1095.

of

Ch. III. s. 4. *Husband and Wife.*

of marriage, also prevents them from giving evidence against each other; for it would be hard that the wife, who could not be a witness for her husband, should be a witness against him: such a rule would occasion implacable divisions and quarrels between them.

The rule extends even to criminal prosecutions, except the case of high treason, where it has been said, the law deems the allegiance due to the crown paramount to every private obligation: (though even this has been doubted) and as we have before seen, that witnesses in some degree interested may be admitted where absolute necessity requires it, so where the husband has committed personal violence on the wife, she may, from the necessity of the case, be examined as a witness against him; as in the case of *Lord Audley*, who was indicted for assisting in the rape of his wife; and though the propriety of this decision was at one time doubted, yet reason seems strongly to support it; and more modern cases have adopted the practice, and admitted her evidence against her husband of personal violence, or ill-treatment of herself.

Vide 1 Brownl. 47; 2 Keb. 403. 1 Hal. P. C. 301.

Hawk. P. C. lib. 2, c. 46, s. 16.

1 State Tr. 265. 269. Hutton, 115. Vide Sir T. Raym. 1. Rex *v.* Azire, 1 Stra. 633.

[174]

It is clearly settled, that a woman who never was legally the wife of a man, though she has been in fact married to him, may be a witness against him; as in an indictment for bigamy, the first marriage being proved by other witnesses, the second wife may be examined to prove the marriage with her, for she is not *de jure* his wife: so if a woman be taken away by force and married; on an indictment against the husband *de facto*, founded on the statute 3 Hen. 7, she is a witness to prove the fact, because the contract of marriage being obtained in express violation of that law, has no binding operation. But on an indictment for bigamy, the first wife is no witness to prove her marriage, because she is legally his

Bul. N. P. 287.

Hawk. lib. 2, c. 46, s. 16.

1 Hal. P. C. 693.

his wife, and therefore incompetent to give evidence against him. And if a woman who was once legally the wife of a man, be divorced *a vinculo matrimonii* by act of parliament, she cannot afterwards be called as a witness against him to prove any fact which happened during the coverture; but she is competent to give evidence of transactions which took place subsequent to the divorce.

Monroe *v.* Twisleton, Appendix.

The rule of law does not merely prevent a husband or wife from giving evidence for the purpose of criminating each other, it goes much further, and precludes any evidence which has the *least tendency* to it, or which directly prejudices the civil rights of either. Neither in a civil action, nor a criminal prosecution, are they permitted to give any evidence which, in its future effects, may criminate each other; and this rule is so inviolable, that no consent of the other party will authorize the breach of it. But in civil actions, where neither is a party, the wife may be called as a witness to prove facts which may eventually charge the husband with a debt (*s*).

[175]

In

(*s*) In an action for a malicious prosecution, the defendant was willing that the plaintiff's wife should be examined. Lord *Hardwicke*, "The reason why the law will not suffer the wife to be a witness for or against her husband, is to preserve the peace of families, and therefore I shall never encourage such a consent;" and she was not examined. *Barker* v. *Sir Woolston Dixie, bart.* Cases Temp. Hard. 264.

In ejectment the plaintiff made title to his lessor to the lands in question, as son and heir to *Jerome Jaques*, and *Hannah* his wife, in right of *Hannah*. The defendant gave in evidence that *Jerome Jaques* was married before he was married to *Hannah*; and the woman to whom it was supposed he was married before, was produced at the trial, (Sum. Assiz. 13 W. 3, at Maidstone,) to prove this marriage. The counsel for the plaintiff opposed her testimony, because she swore for her advantage; viz. to have a husband, the husband being then living. But nevertheless *Gould*, J. of the King's Bench, then judge of assize, admitted her testimony. But afterwards the same title, between the same parties, was tried before *Holt*, C. J. at the assizes in March, at Maidstone, 1 Anne, Reg. and he refused, after debate, to admit the former wife to be a witness for this purpose: but upon other evidence, the former marriage

Ch. III. s. 4. *Professional Confidence.*

In like manner, as the law respects the private peace of men, it considers the confidential communications made for the purpose of defence in a court of

[176]

marriage was proved to the satisfaction of the jury, being gentlemen, whereupon they found a verdict for the defendant. But in the same trial before *Gould*, J. the jury found a verdict for the plaintiff. *Broughton* v. *Harper*, 2 Lord Raym. 752.

In an action by a plaintiff, as a feme sole, for goods sold, &c. the defendant called the husband as a witness, to prove that she was a married woman; and he was admitted, and the plaintiff was nonsuited. On a motion to set it aside, the majority of the court thought he was not admissible on the ground of policy; *Buller*, J. doubted at first, upon the ground that the husband was not interested in that case, but he afterwards acceded to the opinion of the court, upon the broad ground adopted by them, of the impolicy of permitting husband and wife to give evidence for or against each other. *Bentley* v. *Cook*, cited 2 T. Rep. 265.

In the case of the *King* v. *the Inhabitants of Cliveger*, 2 T. Rep. 263: On an appeal against an order of removal, the respondents proved a marriage in fact between the paupers; and the appellants contending that the husband had a former wife living, called him, but he denying the fact, they offered to call her for the purpose of proving it. The sessions rejected her evidence, and the question coming on before the court of King's Bench, the judges of that court were also of opinion that she was an incompetent witness. *Ashhurst*, J. said, "The ground of her incompetency arises from a principle of public policy, which does not permit husband and wife to give evidence that may *even tend to criminate* each other. The objection is not confined merely to cases where the husband or the wife are directly accused of any crime, but even in collateral cases, if their evidence *tends* that way, it shall not be admitted. Now here the wife was called to contradict what her husband had before sworn, and to prove him guilty of perjury, as well as bigamy; so that the tendency of her evidence was to charge him with two crimes. However, though what she might then swear could not be given in evidence on a subsequent trial for bigamy, yet her evidence might lead to a charge for that crime, and cause the husband to be apprehended. In that point of view, therefore, I am of opinion, that her testimony ought not to have been received, because it is an established maxim, that husband and wife shall not give evidence to criminate each other." *Grose*, J. said, "The general rule, as to husband and wife being witnesses, was founded not on interest, but on policy; by which it was established, that a wife should not be called to give testimony *in any degree to criminate her husband*;" and Lord *Hale* says, that she shall not be called even *indirectly* to criminate him; and that rule seems to have governed all the decisions from that time to the present. The true and just ground of objection is not that of interest, but is

Ch. III. s. 4. *Professional Confidence.*

of justice. By permitting a man to intrust his cause in the hands of a third person, it establishes a confidence and trust between the client and the person so employed. A *counsel*, *solicitor*, or *attorney*, cannot conduct the cause of his client if he is not fully instructed in the circumstances attending it: but the client could not give the instructions with safety, if the facts confided to his advocate were to be disclosed. Barristers and attorneys, therefore, to whom facts are related professionally, during a cause, or in contemplation of it, are neither obliged nor permitted, though they should so far forget their duty as to be willing to do so, to disclose the facts so divulged, during the pendency of that cause, or at any future time; and if a foreigner, in communicating with his attorney, has recourse to an interpreter, he is equally bound to secrecy [1]. But where the attorney himself is, as it were, a party to the original transaction, as if he attest the execution of

[178]

Wilson v. Rastal, 4 T. Rep. 753.

[1] Du Barre v. Livette, Peake's Cas. 77.

is founded on the political inconvenience of causing dissentions in families, between husband and wife, and so it is put by Lord *Hale*.

In *Davies* v. *Dinwoody*, 4 T. Rep. 678, which was an action brought by the trustees, under a marriage settlement, whereby goods were secured to the wife, against the sheriff for taking them under an execution against the husband; he was called to prove the identity of them: an objection was made to him on account of interest; and on the case coming before the court, the plaintiff's counsel argued that she was not interested; but it was answered per Lord *Kenyon*, C. J. that independently of the question of interest, husbands and wives are not admitted as witnesses, either for or against each other: from their being so nearly connected, they are supposed to have such a bias upon their minds, that they are not to be permitted to give evidence for or against each other.

It is observed in the text, that between third persons, a wife may be admitted to give evidence, which throws the demand upon her husband. Thus in an action against the daughter's husband for her wedding clothes, her mother was admitted to give evidence, which showed that they were delivered on the credit of the mother's husband. *Williams* v. *Johnson*, 1 Stra. 504.

a fraudulent

Ch. III. s. 4. *Professional Confidence.*

a fraudulent deed [1](*t*), was present when his client was sworn to answer in Chancery [2], or employed as the steward or agent (*u*), and does not gain his knowledge

[1] Duffin *v.* Smith, Peake's Cas. 108.

[2] Vide Doe dem. Jupp *v.* Andrews, Cowp. 846. Bul. N. P. 284. 2 Stra. 1122, contra.

(*t*) On this principle, *Abbott*, C. J. held that on a question whether the defendants were partners or not, an attorney who had been consulted by them professionally, as to the dissolution of their partnership, might be called to prove that fact, and stated the rule to be, that the protection was only extended to those communications which related to a cause existing at the time of the communication, or then about to be commenced. *Wadsworth* v. *Hamshaw*, cited 2 Brod. & Bing. 5. But in the case of *Cromach* v. *Heathcote*, Ibid. the Court of Common Pleas ruled, that an attorney who had been applied to to draw a bill of sale of goods, which he refused, considering it as fraudulent, could not afterwards disclose the communication then made, considering it as a confidence which ought not to be broken. *Richardson*, J. said, "Suppose the case of an attorney, consulted on the title to an estate, where there was a defect in the title, can it be contended that he would ever be at liberty to divulge the flaw." *Quære.* Is not the one case, that of a confidential communication of a pre-existing fact, and the other, the doing of an act in which the attorney either does become, or is invited by the party to become a participator?

(*u*) *Wilson* v. *Rastal*, 4 T. Rep. 753. In an action on the bribary act, *W. Handley* was called, who deposed, that previous to the dissolution of parliament, in the spring of 1790, he had received letters from the defendant, which he had given to Mrs. *Handley*, with directions to destroy them; but did not know whether she had done so or not. *B. Handley* was then called, who said he had the letters in question, which he received from Mrs. *H.* and that *W. H.* was at that time under prosecution for bribery, and he wished to render him what assistance he could. That Mrs. *H.* had desired him to destroy the letters, but that he had kept them. That there was no action now pending against *W. H.* but the two years were not expired. The letters were not, as he knew of, put into his hands with *W. H.*'s privity, but he had kept them with his privity or consent. *W. H.* had indeed desired him to destroy them, but he had not done so, for the same reason as he had not complied with the like request from Mrs. *H.* namely, that he had soon after the election stated, that *W. H.* acted only under the direction of the defendant in the election business. He further stated, that he was not then concerned in carrying on any suit for *W. H.*; that he never was attorney in any action of indemnity; that he had been applied to by *W. H.* to be concerned, but had declined it; giving as a reason, that he was undersheriff, and a material witness in the cause. That he had not employed *W. H.*'s attorney for him, but *that W. H. had consulted him in his profession as a confidential person, and had applied to him both before and after he had received the letters. He had desired the witness to consult with his attorney, which he had done, as well as with W. H.*

ledge of it merely by the *relation of the client*, the rule does not apply, for in these cases, there was no *professional confidence*, and he stands in the same situation as every other person. In like manner, where after the compromise, though before the final conclusion of a cause, a party told his attorney, by way of exultation, that he had succeeded in recovering a sum of money to which he was not entitled; it was held that the attorney might prove this fact; because it was not a *confidential* communication for the purpose of enabling him to conduct the cause; and for the same reason, if an attorney in the course of a cause interrogate a witness, as to his knowledge of certain facts, and such witness, on being called in another cause, give a different account from that formerly related by him to the attorney, the adverse party may call the attorney to discredit the witness by proving the relation made to him on such examination: so where a notice to produce papers had been delivered to an attorney in the course of a cause, it was held that the party giving such notice might call the attorney to whom it was delivered to prove the contents of it.

[179]

Cobden *v.* Kenrick, 4 T. Rep. 431.

Mr. Berkley's Ev. in Duchess of Kingston's case, 11 St. Tr. 253.

Spencely *v.* Schulenberg, 7 East, 357.

This rule of professional secrecy extends only to the case of facts stated to a legal practitioner for the purpose of enabling him to conduct a cause; and therefore a confession to a clergyman or priest, for the purpose of easing the culprit's conscience, the statement of a man to his private friend, or of a patient to his physician, are not within the protection of the law. We should certainly think that the friend, or the physician, who *voluntarily* violated the confidence reposed in him, acted dishonourably; but he

[180]

Sparke's case, cited Peake's Cases, 77. Duchess of Kingston's case, 11 St. Tr. 243, &c.

W. H. himself. The letters were communicated to him in consequence of W. H. applying to him professionally. On this case Mr. B. *Thompson*, who tried the cause, thought that *B. H.* was confidentially employed by *W. H.* and that therefore he could not be examined; but the court afterwards, being of a contrary opinion, granted a new trial.

cannot

Ch. III. s. 4. *Persons who have signed an Instrument, &c.*

cannot withhold the fact, if called upon in a court of justice.

Where a man has, by putting his name to an instrument, given a sanction to it, he has been held by some judges to be precluded or estopped from giving any evidence in a court of justice which may invalidate it; as in the case of a party to a bill of exchange or promissory note, who has been said not to be an admissible witness to destroy it, on the ground, that it would be enabling two persons to combine together, and by holding out a false credit to the world, to deceive and impose on mankind. On this principle it was held, that an endorser could not be a witness to prove notes usurious in an action on a bond founded on such notes, though the notes themselves had been delivered up on the execution of the bond. At one time this seems to have been understood as a general principle, applying to every species of written instrument; but in a case where an underwriter of a policy of insurance was called to prove the instrument void as against another underwriter, and objected to on this ground; the court declared, that it extended only to *negotiable* instruments, and he was admitted to give evidence destructive of the policy. It had been in former cases [1] determined, that a man attesting the execution of a will was not thereby estopped from proving the insanity of the testator, though it went much to his credit; and in a late case [2], in which that of *Walton* v. *Shelley* came to be re-considered, and underwent much discussion, it was solemnly decided by the Court of King's Bench, one judge only (Mr. J. *Ashhurst*) dissenting, that in an action by an endorsee of a bill of exchange against the acceptor, the latter might call the payee and endorser to prove that the bill was void in its creation, as being drawn in *London* without stamp, though dated abroad; and that

Vide Walton v. Shelley, 1 T. Rep. 296.

Ibid.

[181] Bent v. Baker, Append.

[1] Wright dem. Clymer v. Littler, 3 Burr. 1244. Lowe v. Jolliffe, 1 Blac. 365.

[2] Jordaine v. Lashbrooke, 7 T. Rep. 601.

that the case of *Walton* v. *Shelley* was not law. So in another case [1], Lord *Kenyon* held the endorser of a bill of exchange (he being released by the acceptor) a competent witness to prove that he parted with it to the plaintiff on a usurious consideration. We are now consequently to consider the rule as no longer existing.

Ch. III. s. 4. *Estopped by his own Act.*

[1] Rich v. Topping, Peake's Cas. 224. Esp. 177, S. C.

It has in some cases been doubted also, how far persons who have passed as married to the world, may be admitted to prove they were not so, in a question as to the legitimacy of their issue, and several contradictory decisions have taken place on this point (*x*). In questions of legitimacy, Lord

[182]

Cowp. 594.

(*x*) *Rex* v. *Stockland*, Burr. S. C. 508. In a sessions case, proof was given, that two persons had cohabited together as man and wife for thirty years, and the sessions refused to hear the supposed husband examined, to prove that no marriage had in fact taken place between them, and the Court of King's Bench held the decision to be right. But in *Rex* v. *St. Peter*, Burr. Ses. Cas. 25; Bul. N. P. 112, it was held that the supposed husband was a competent witness to disprove the marriage.

In *Standen* v. *Standen*, Peake's Cas. 32. Lord *Kenyon* permitted a man who had been in fact married, to prove that the banns of marriage were not duly published; and in a still later case which came before the court, the reputed wife was held to be competent to prove she was not married. Thus, in

Rex v. *Inhabitants of Bramley*, 6 T. Rep. 330, on the hearing an appeal from an order of removal, the respondents produced evidence to show the settlement of the pauper's father was at *Bramley*; and in order to prove his marriage with the mother, produced witnesses to prove they cohabited together, and were reputed as man and wife. The appellant offered to produce the mother to show that she never was married, or that if she ever was, the ceremony took place in *Ireland*, under such circumstances as the appellants contended by the laws of *Ireland*, rendered it wholly void. This was objected to, and the Court of Quarter Sessions being of that opinion rejected it, subject to the opinion of the court. Lord *Kenyon* said, this evidence was certainly admissible, though the justices of sessions were to judge as to the effect of it. His lordship then mentioned *Rex* v. *St. Peter*, and said, there are many other cases in which it has been decided, that the parents may be called as witnesses with respect to the legitimacy of their issue; and if they may be called to prove they are legitimate children, there is no reason why they should be considered as incompetent, when called to prove that the children are illegitimate; but in all these cases such testimony is open to great observation.

Ch. III. s. 4. *Estopped by his own Act.*

[183]

Goodright dem. Stevens v. Moss, Cowp. 591.

Mansfield said, that as to the *time of the birth*, the father and mother were the most proper witnesses to prove it; and in the principal case, declarations of the deceased parents, that a child was born *before* the marriage, was admitted; but he added, that it was a rule founded in decency, morality, and policy, that they should not be permitted to say after marriage, that they had no connection, and therefore that the offspring was spurious, more especially the mother, who was the offending party; that point, his lordship added, was solemnly determined at the delegates. The question of access or non-access, was totally different from giving evidence of the time of the birth; and it was clear, that the declarations of a father or mother could not be given in evidence to bastardize the issue born *after* marriage (*y*).

Ibid. 592.

SECTION V.

Of Persons who are privileged from giving Evidence.

Ch. III. s. 5. *Privilege.*

[184]

I OBSERVED before, that no one could be compelled to give evidence which tended to charge himself with a crime; and therefore the putative father of a bastard, though he may voluntarily come and state the fact, cannot be compelled to answer a question upon the subject[1]; and if a person who has been knowingly concerned in the writing or publica-

[1] Rex v. St. Mary Nottingham, 13 East. 57.

(*y*) In *Rex* v. *Reading*, Cas. Temp. Hard. 79. On an order of bastardy, the person on whom the bastard was charged to be got was a married woman, and the court held that she was competent to prove the criminal conversation of the defendant with her, but not the non-access of her husband. And in *Rex* v. *the Inhabitants of Kea*, 11 East, 132, it was holden that a woman was equally inadmissible to prove the non-access after her husband's death as in his life-time. In *Rex* v. *Inhabitants of St. Mary Nottingham*, 13 East, 57, the court held that a bastard might be examined to prove his own illegitimacy, and that the reputed father might also be examined, (if he chose to admit the fact) though he was not compellable to answer.

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tion of a libel is called for the purpose of proving the fact, he may object to give any evidence tending to prove his own criminality (*z*). It was also at one time held, that the law protected a man's pecuniary interests, as well as his person, and that therefore he was not compellable to give any answer which might subject him to a civil action, or charge himself with a debt [1] (*a*). But as a man cannot, by making his interest

[1] Title v. Grevett, 2 Lord Raym. 1008.

(*z*) In *Maloney* v. *Bartley*, 3 Campb. 210, a person, who, by the direction of a magistrate's clerk, had written an extra-judicial affidavit, which was afterwards sued upon as a libel, was called for the purpose of proving that he had written it by the order of the defendant, and Mr. Baron *Wood* held, that he was not obliged to answer any question as to his writing it by the direction of the defendant; and in *Stevenson* v. *Jones*, Stafford Sp. Assiz. 1821, which was an action for a libel inserted in the *Stafford* newspaper, the printer having proved that certain alterations and interlineations were made after the libel had been delivered by the defendant to him, his servant was called, and proved that the word *Barton* (one of the interlineations) was written by him by the direction of *Bowers*, an occasional clerk of *Jones*. *Bowers* was then called and asked, whether he had given such direction. He objected to answer the question as tending to criminate himself, and the objection being supported by the defendant's counsel, and opposed by those of the plaintiff. *Park*, J. ruled, that he was compellable to answer, because he might by the direction of the defendant, or any other person, give orders for the alteration of a particular word without himself knowing the contents of the paper, and if he did not know them, he would not be guilty of a libel. He then swore that he ordered *Barton*'s name to be inserted without any authority from the defendant; and upon this evidence the plaintiff failed as to this libel. Another libel being charged in the declaration, in which there were also certain interlineations of some length: *Bowers* was next examined as to them, and admitted they were in his hand-writing, when the judge interposed and said, that now no further questions could be asked, for it was impossible that he could make long interlineations without knowing the contents of the libel, and therefore any further evidence would tend to criminate himself. The plaintiff called several other witnesses for the purpose of bringing home the libel to the defendant, but not being able to do so was ultimately nonsuited.

(*a*) *Bain* v. *Hargrave*, K. B. Sit. at Guildhall after Hil. Term, 35 Geo. 3. MS. *Assumpsit* for money had and received. The defendant had been clerk to the plaintiff, who was a considerable wharfinger, and had received several sums of money in that character, which had not been paid over to the plaintiff.

Ch. III. s. 5. *Privilege.*

Hawkins *v.* Perkins, 1 Stra. 406.

interest the same as that of the party who has a right to his testimony, deprive such party of the benefit of it; so neither could he, by voluntarily acquiring an interest the other way, enable himself to object to give evidence; and therefore, where a subscribing witness to promissory note afterwards became bail for the maker, he was compelled to give evidence of the execution (*b*).

The defendant contended, that he was not liable to pay this money to the plaintiff, having paid it over to one *Wright*, another clerk of the plaintiff's, who was authorized to receive it from him.

To prove this case, he called *Wright* as a witness, who swore that he knew the state of the defendant's account, and that no money was due from the defendant to the plaintiff. Upon which *Erskine*, the plaintiff's counsel, asked him, whether some money was not due from some person to the plaintiff: and the witness demurring to this question, Lord *Kenyon* said, that he would not oblige him to answer any question, which might tend to charge himself with the debt. A man might come voluntarily, and charge himself with a debt, but he could not be *compelled* to charge himself civilly, any more than to make himself liable to a criminal prosecution.

The jury believing that *Wright* was authorized to receive this money, and that it had been paid to him, were about to find a verdict for the defendant, when the plaintiff chose to be nonsuited.

Raynes v. *Towgood*, K. B. Sit. at Guildhall, after Mich. Term, 37 Geo. 3. MS. Debt on stat. 7 Geo. 2, c. 8, against stock-jobbing. The plaintiff called *Nordon*, the broker who made the contracts, to prove the fact. By the 4th sect. of the act of parliament, he is subjected to a penalty of 500*l.* He objected to answer any question which might tend to charge himself with the penalty. *Gibbs*, for the plaintiff, contended, that as this was not an indictable offence, but merely subjected the party to a pecuniary penalty, he could not refuse to be examined. Lord *Kenyon* was of opinion, he could not compel him to give evidence, which would subject him to a penalty. For want of other evidence, the plaintiff was nonsuited. The Court of King's Bench afterwards gave time to the plaintiff to proceed to trial in two other actions brought by him against other persons, until the time within which the action against the broker is to be commenced had elapsed. Vide *Raynes* v. *Spicer*, 7 T. Rep. 178.

(*b*) Pending the impeachment against Lord Melville, the doctrine contained in this chapter underwent much discussion in both Houses

Houses of Parliament, and the following questions were put to the judges by the House of Lords, viz.

1. Whether, according to law, a witness can be required to answer a question relevant to the matter in issue, the answering which has no tendency to accuse himself, but the answering which may establish, or tend to establish, that he owes a debt recoverable by civil suit?

2. Whether, according to law, a witness can be required to answer a question relevant to the matter in issue, the answering of which would not expose him to a criminal prosecution, but might expose him to a civil suit, at the instance of his majesty, for the recovery of profits derived by him from the use or application of public money contrary to law?

3. Whether a person proffered to be examined as a witness, and who is to be discharged from debts in case he fully discloses every act, matter, transaction, and thing within his knowledge, concerning which he shall be examined, and is to remain liable to debts if he does not so disclose, is a witness whose testimony may be repelled on the ground of interest?

The judges delivered their opinions *seriatim*, but there being much difference of opinion among them, it was thought necessary to clear up the doubts which existed by passing a declaratory act on the subject; and accordingly a bill was introduced into the House of Lords, which was afterwards passed into a law in the following terms:

46 Geo. 3, c. 37.—An act to declare the law with respect to witnesses refusing to answer.

Whereas doubts have arisen whether a witness can by law refuse to answer a question relevant to the matter in issue, the answering of which has no tendency to accuse himself, or to expose him to any penalty or forfeiture, but the answering of which may establish or tend to establish that he owes a debt, or is otherwise subject to a civil suit at the instance of his majesty, or of some other person or persons: Be it therefore declared and enacted, by the King's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present parliament assembled, and by the authority of the same, that a witness cannot by law refuse to answer a question relevant to the matter in issue, the answering of which has no tendency to accuse himself, or to expose him to penalty or forfeiture of any nature whatsoever, by reason only, or on the sole ground, that the answering of such question may establish or tend to establish that he owes a debt, or is otherwise subject to a civil suit, either at the instance of his majesty or of any other person or persons.

A rated inhabitant of a parish is considered as a party to an appeal between his parish and another touching the settlement of a pauper; and being as such directly interested in the event of the appeal, cannot be compelled to give evidence by the adverse parish under the above act of parliament. *Rex* v. *Woburn.* 10 East, 395. But see the stat. 54 Geo. 3, c. 170, *ante*, 157.

SECTION VI.

Of the Examination of Witnesses.

[186] Ch. III. s. 6. *Examination.*

WHEN a witness was liable to any objection on account of interest, &c. the old rule was either to examine him upon the *voir dire*, as to his situation, or to call other witnesses to prove the fact which rendered him incompetent. The party against whom he was produced had his election which of these modes he would pursue, but he could not adopt both; and if the witness denied his interest, no other evidence could afterwards be produced to prove it, for the purpose of rendering him incompetent; but the party was not precluded from contradicting the fact so sworn by other evidence, and thereby lessening the *credit* of the witness with the jury. If he appeared to be incompetent, either by his own examination on the *voir dire*, or by other evidence, the objection was immediately made; for if not taken before he was sworn in chief, it was considered as too late after he had been examined by the party calling him, and cross-examined by the other side. But the modern practice is to swear the witness in chief in the first instance; and if at any time during the trial it be discovered that he is in a situation which renders him incompetent, it is then time to take the objection; but the bare circumstance of a witness being discovered to be incompetent after the trial, is not alone sufficient ground for a new trial; however it may, when added to others, weigh with the discretion of the court.

Vide Abrahams *v.* Bunn, Appendix. 10 Mod. 193. Lord Lovat's case, 9 St. Tr. 645-6.

Per Buller, J. 7 T. Rep. 719.

[187]

Turner *v.* Pearte, 1 T. Rep. 719.

On this examination of a witness, as to his situation, he may be asked any questions concerning instruments he has executed, &c. without producing those instruments; for the party against whom he

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is called, not knowing the witnesses to be produced against him, cannot always be prepared with the evidence to prove him incompetent.

So if a witness on examination confess that he was originally interested, he may restore his competency by proving that he has been since a bankrupt, and received his certificate, or any other fact whereby his interest is determined. But had his interest been proved by other evidence, his certificate should have been produced; and if a release be given by or to the witness, for the express purpose of rendering him competent, it should be produced, and the subscribing witness called to prove it.

Botham v. Swingler, Peake's Cas. 218. Esp. 164, S. C. Vide etiam Rex v. Gisburn, 15 East, 57.

When a witness is not liable to any legal objection, he is first examined by the counsel for the party on whose behalf he comes to give evidence, as to his knowledge of the fact he is to prove. This examination, in cases of any intricacy, is a duty of no small importance in the counsel; for, as on the one hand the law will not permit him to put what are called leading questions, viz. to form them in such a way as would instruct the witness in the answers he is to give; so on the other, he should be careful that he makes himself sufficiently understood by the witness, who may otherwise omit some material circumstance of the case. Of late years, the rule as to leading questions has been somewhat relaxed in the case of an original examination; and where it evidently appeared that a witness was hostile to the party by whom he was called, and unwilling to answer questions put to him, the examination in chief has been permitted to assume the appearance of a cross-examination, and leading questions to be put to a witness. It is impossible to point out the cases in which the general rule of law shall be so departed from; and therefore it must be left wholly to the

[188]

Ch. III. s. 6. *Examination.*

discretion of the judge, who in general is guided by the demeanour of the witness, and the situation he stands in with relation to the parties.

The counsel retained on the other side, next cross-examines the witness; and the witness not being supposed so friendly to his client as to the party by whom he is called, he is not restrained to any particular mode of examination, but may put what questions he pleases. He may, for the purpose of trying the credit of the witness, suppose facts *apparently connected with the cause*, which have no existence but in his own imagination, and ask the witness if they did not happen. No mischief can arise from this course of examination; for, if the witness is determined to speak nothing but the truth, he will deny every thing so suggested, and the testimony of every other who is called will confirm him. But it frequently happens, on the other hand, that witnesses who have entered into a wicked conspiracy to defeat justice, and who, having made up their story together, agree upon the general features of the case,

[189]

will, when examined out of the hearing of each other (*c*), by their variations in little circumstances, as to which they are unprepared, betray the villainy of their attempt; and by their contradictions be rendered utterly unworthy of credit. A cross-examination to this extent has never been objected to; but how far a counsel may, on cross-examination, inquire into matters *foreign to the cause*, for the purpose of affecting the character and credit of the

(*c*) It appears that the present practice of ordering witnesses out of court during the progress of a cause, so as to prevent them from hearing the testimony of others, is very ancient. Fortescue de Laudibus, c. 26, says, "Et si necessitas exegerit, dividantur testes hujusmodi, donec ipsi deposuerint quicquid velint, ita quod dictum unius non docebit aut concitabit eorum alium ad consimiliter testificandum." See also *Williams* v. *Hulie*, 1 Sid. 131.

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witness, has, as I have before observed, been the subject of much difference of opinion, and appears to be even at present not very well settled.

It must frequently occur, that in the cross-examination of a witness as to the representations by him contrary to what he deposed in chief, the counsel will have occasion to refer to letters or other written papers of the witness himself; and objections have frequently arisen at Nisi Prius as to the mode in which such contradictions shall be put to the witness, or given in evidence against him. In the proceedings on the Bill of Pains and Penalties against the Queen, (Friday, Sept. 1st, 1820,) this question was more formally discussed and decided than on any former occasion; and as such decision must be considered as a rule for all future cases, it will not be out of place to state the case fully here.

Louisa Dumont having been examined as to certain facts, Mr. *Williams*, in his cross-examination, asked her whether she did not use certain expressions which he read from a supposed letter from the witness to her sister; on which the Attorney-General objected, that as the questions were drawn from a written source, the letter ought to be put in before making use of its contents; and the point having been argued at length by the counsel, the Lord Chancellor moved that a question should be proposed to the judges for their opinion, "whether in the courts below a party, on cross-examination, would be allowed to represent in the statement of a question the contents of a letter, and to ask the witness whether the witness wrote a letter to any person with such contents, or contents to the like effect, without having shown to the witness the letter, and having asked him if he wrote such letter and his admitting that he wrote it?" and after some debate, that question

Ch. III. s. 6. *Examination.*

tion was proposed, with the following addition, "and whether, when a letter is produced in the courts below, the court will allow a witness to be asked, upon showing the witness a part of, or only one or more lines of such letter, and not the whole, whether he wrote such part, or such one or more lines, and in case the witness shall not admit that he did write the same, the witness can be examined as to the contents of such letter?" The judges having retired for a short time, returned to the house, and the Lord Chief Justice of the King's Bench answered, that to the first question on which they were called on to speak, they answered in the negative; and stated, that the grounds on which they had so decided were, that according to the established rules of evidence, the contents of every written paper must be proved by the paper itself; therefore the witness must first be asked, whether the paper be in his hand-writing? and then the paper would, if the witness admitted it, be put in to be read as evidence by the cross-examining counsel in his proper season, and the court would be in possession of the whole.

The next question, (viz.) "whether the counsel would be allowed to ask a witness whether a part or the whole, or one or more lines, were in the witness's hand-writing, and whether, if the witness denied the hand-writing, the counsel could proceed to cross-examine him as to the contents of the letter without showing the whole?" the Chief Justice said, that the judges had divided into two parts, and given a distinct answer to each of its parts. To the first part, whether counsel would be allowed to show any part of a letter, or one or more lines, and to ask the witness whether that were the witness's hand-writing, they had given their opinion in the affirmative; but to the latter part of the question, viz. whether,

ther, if the witness denied such part or parts to be his hand-writing, counsel might proceed to examine the witness as to the contents of the letter without showing him the whole, they were of opinion that he he could not, because, as he had before stated, to prove the contents of a paper, the paper itself must be produced.

After some observations, the Lord Chancellor informed the counsel, that their lordships had decided that they could not be allowed, on merely stating the contents of a letter, to ask the witness whether she had ever written or sent such a letter; and further, that they would be allowed to show the witness any part or parts of a letter, and to ask if such parts were in the witness's hand-writing, but they could not be allowed to examine the witness upon the contents of such letter unless the whole were shown to the witness to ascertain the hand-writing. Upon this, Mr. *Williams* showed the witness several letters, which she admitted to be of her hand-writing; and he was proceeding to put a question respecting the contents of these letters, when the Attorney-General objected to such questions, unless the letters were put in. This point was argued at length by the respective counsel, after which the Lord Chancellor proposed that the following question should be submitted to the judges, viz. " whether when a witness is cross-examined, and upon the production of a letter to the witness under cross-examination, the witness admits that he wrote that letter, the witness would be examined in the courts below, whether he did or did not in such letter make statements such as the counsel shall by questions, addressed to the witness, suggest are or are not made therein; or whether the letter itself must be read as the evidence to manifest that such statements are or are not contained therein, and in what stage of the proceedings, according to the

Ch. III. s. 6. *Examination.*

the practice of the courts below, the letter could be required by the counsel to be read, or be permitted by the courts below to be read?"

This question was accordingly submitted to the judges, and in about ten minutes the Lord Chief Justice of the King's Bench returned the answer of the judges to the first part of the question, that the question propounded by the counsel could not be a question addressed to the witness as to the inquiry whether or no certain statements are contained in the letter, but that the letter itself must be read to manifest that such statements are or are not contained in the letter. His lordship said, that in giving that opinion the judges did not consider that they were presuming to offer to their lordships any new rule of evidence now for the first time given by them, but that they founded their opinion upon what was a rule of evidence as old as any part of the common law of England, namely, that the contents of a written instrument, if in existence, must be proved by the instrument itself, and not by parol evidence. In answer to the latter part of their lordships question, in what stage of the proceeding, according to the practice of the courts below, such letter could be required by the counsel to be read, or be permitted by the courts below to be read, the judges were of opinion, according to the ordinary rule of proceeding in the courts below, the letters were to be read as the evidence of the cross-examining counsel, as part of his evidence, in his turn, after he should have opened his case; but if the counsel cross-examining suggested to the court that he wished to have it read immediately, in order that he might, after the contents of the letter should have been made known to the court, found certain questions upon it, to be propounded to the witness, which could not well or effectually be done without first reading

reading the letter itself, that becomes an excepted case in the courts below, and for the convenient administration of justice, the letter is permitted to be read at the suggestion of the counsel, but considering it, however, as part of the evidence of the counsel proposing it, and subject to all the consequences of considering such letter as part of his evidence.

On a subsequent day, (Friday, Sept. 5th,) a witness of the name of *Sacchi* being under cross-examination, was asked if he ever represented to any person that "he taxed himself with ingratitude to a most generous mistress?" (meaning the Queen) upon which the Attorney-General objected, that if the representation were made by the witness in writing, the paper ought to be put in before the question was put to the witness; but if it was only a representation made by the witness in conversation, there could be no objection to the Queen's counsel asking, Did you represent so and so in conversation? This point having been argued,

The Lord Chancellor said, that the opinion given by the judges on a former occasion, was not exactly a decision upon the case before the house. That was a decision upon a case where written papers were produced. Here there was as yet no paper produced. If the witness could be sure that the papers about which he was asked were existing, it would be competent for the counsel to call for their production. He could not say that it was so in a case where there might be a knowledge of papers which had existed, but for aught the court knew, were not existing at the time of inquiry. He proposed that it should be submitted to the judges, for their opinion, "whether or not a witness could be cross-examined in the lower courts as to representations of a particular nature, it not being specified in the question whether it referred to representations

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Ch. III. s. 6. *Examination.*

in writing or in words, supposing that the counsel on the other side objected to such cross-examination?" The judges having retired to deliberate, afterwards returned to the house, and the Lord Chief Justice of the King's Bench delivered their opinion. He said it was not in the recollection of any of the judges that a question of the nature proposed by the counsel had ever been put in the courts below; but that questions of a similar nature were of every-day occurrence. In questions referring to contracts and agreements, the witness was frequently asked if there was any agreement for the sale of a particular article; on which it was the ordinary practice for the counsel to put an intermediate question to the witness, and ask whether the agreement was in writing. If the answer of the witness was in the affirmative, then the agreement in writing must be put in; if in the negative, the counsel might proceed to question the witness on the nature of the agreement. Although, therefore, himself and his learned brothers could not speak distinctly in the affirmative or the negative upon the question proposed to them by their lordships, yet, with reference to the principles of the law of evidence, as decided by practice relative to contracts and agreements, the other judges, with himself, were decidedly of opinion that the question could not be put in its present form; but it might be divided, and the witness might be first asked generally if he had made any declarations or representations, and if he answered in the affirmative, he might be asked the particulars of those representations, the counsel on the other side being permitted by the house to interpose the question whether the declaration was in writing.

The Lord Chancellor said, he always understood the rule to be as given by the judges; and, on the counsel being called in, informed them, that the house had

had decided, the counsel cross-examining must first ask if the declaration of the witness was made orally or in writing; and, after some observations from Lords *Grey* and *Erskine*, added, that he thought the best course would be for the counsel for her Majesty to be asked if he would ask the witness if he had made a representation, with the understanding that the counsel for the bill was to be allowed to ask the witness, before that question was answered, if he had made the representation in writing.

Having thus noticed the course of examination which is permitted for the purpose of affecting the credit of a witness as to declarations or representations made by him respecting the subject of the cause, it will be proper to remind the reader that such examination is absolutely necessary, to enable the party against whom he is called to show the fact alleged against him; for though the party is not bound, as we have seen in other cases not connected with the cause, (ante, 135,) to take the story of the witness exactly as he chooses to give it, yet he is not permitted to inquire from other witnesses as to the fact alleged without first examining the witness to it.

Though this has long been the established course of proceeding in Westminster-Hall, yet it was questioned in the House of Lords, on the bill against the Queen, (Friday, Oct. 20th); and an attempt having been made to discredit the above-mentioned witness *(Sacchi)* by showing that he had attempted to suborn other persons to give false testimony against the Queen, the following questions were put to the judges, viz. "1st. Whether, according to the practice and usage of the courts below, and according to law, when a witness in support of the prosecution has been examined in chief, and has not been asked in cross-examination as to any declarations made by him, or acts done by him to procure

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Ch. III. s. 6. *Examination.*

persons corruptly to give evidence in support of the prosecution, it would be competent to the party accused to examine the witnesses in his defence to prove such declarations or acts without first calling back such witness examined in chief to be examined or cross-examined as to the fact whether he never made such declarations, or did such acts?"

"2d. Whether, if on any trial in any court below a witness is called on the part of the plaintiff or prosecutor, and gives evidence against the defendant in such cause, and if after the cross-examination of such witness by the defendant's counsel, they discover that the witness so examined has corrupted or endeavoured to corrupt another person to give false testimony in such cause, the counsel for such defendant may not be permitted to give evidence of such corrupt act of such witness without calling back such witness?"

The Chief Justice, in answer to these questions observed, that the usual practice of the courts below, and a practice to which they were not aware of any exception, was this: If it be intended to bring the credit of any witness into question by proof of anything that he may have said or declared touching the cause, the witness is first asked, upon cross-examination, whether or no he has said or declared that which is intended to be proved. If the witness admits the words or declarations imputed to him, the proof on the other side becomes unnecessary, and the witness has an opportunity of giving such reason, explanation or exculpation of his conduct, if any there be, as the particular circumstances of the transaction may happen to furnish; and thus the whole matter is brought before the court at once, which in our opinion is the most convenient course. If the witness denies the words or declarations imputed to him, the adverse party has an opportunity afterwards

afterwards of contending that the matter of the speech or declaration is such that he is not to be bound by the answer of the witness, but may contradict and falsify it; and if it be found to be such, his proof in contradiction will be received at the proper season. If the witness declines to give any answer to the question proposed to him, by reason of the tendency thereof to criminate himself, and the court is of opinion that he cannot be compelled to answer, the adverse party has, in this instance also, his subsequent opportunity of tendering his proof of the matter, which is received, if by law it ought to be received. But the possibility that the witness may decline to answer the question, affords no sufficient reason for not giving him the opportunity of answering and of offering such explanatory or exculpatory matter as he had before alluded to; and it was, his lordship added, in their opinion, of great importance that that opportunity should be afforded, not only for the purpose already mentioned, but because, if not given in the first instance, it might be wholly lost; for a witness who had been examined, and had no reason to suppose that his further attendance was requisite, often departed the court, and might not be found or brought back until the trial had ended. So that if evidence of this sort could be adduced on the sudden, and by surprise, without any previous intimation to the witness, or the party producing him, great injustice might be done, and, in their opinion, not unfrequently would be done, both to the witness and to the party; and this not only in the case of a witness called by a plaintiff or prosecutor, but equally so in the case of a witness called by a defendant; and one of the great objects of the course of proceeding established by their courts was, the prevention of surprise, as far as was practicable, upon any person who might appear therein."

Ch. III. s. 6. *Cross-examination.*

"The questions propounded by their lordships comprised not only declarations made by a witness, but also, in the language of the first of those questions, "acts done by him to procure persons corruptly to give evidence in support of the prosecution;" and, in the language of the latter question, "a discovery that the witness has corrupted or endeavoured to corrupt another person to give false testimony in such cause."

"They understood the acts thus mentioned to be acts occurring in the ordinary mode and usual course wherein such transactions were proved in common experience to take place; because, they presumed, if the questions had related to an act done in an extraordinary and unusual manner, their attention would have been directed to the special mode and circumstances of the act by the frame and language of the questions. Now such acts of corruption were ordinarily accomplished by words and speeches, an offer of money or other benefit derives its entire character from the purpose for which it was made, and this purpose was notified and explained by words, so that an inquiry into the act of corruption would usually be, both in form and effect, an inquiry into the words spoken by the supposed corruptor; and words spoken for such a purpose did, in their opinion, fall within the same rule and principle, with regard to the proceedings in their courts, as words spoken for any other purpose, and they did not therefore perceive any solid distinction with regard to this point, between the declarations and the acts mentioned in the questions proposed to them."

Re-examination.

When a witness has been cross-examined by the counsel of the party against whom he has been called, the counsel who originally called him is permitted to re-examine him, for the purpose of explaining any facts so brought out on cross-examination; but

in

Re-examination.

in doing this, he cannot ask leading questions more than on his original examination; and if, on cross-examination as to a conversation had by him with a third person, respecting his being a witness in the cause, he mentions what he said to such third person, this does not entitle the counsel by whom he is called to inquire into the whole conversation between him and such third person, so as to let in the assertion of such third person (*d*), but only what induced the witness to make such communication.

Aid of the Witnesses Memory.

The party examined must, as was before observed, depose to those facts only of which he has an immediate knowledge and recollection. He may refresh his memory with a copy taken by himself from a day-book, and if he can then speak positively as to his recollection, it is sufficient; but, if he has no recollection, further than finding the entry in his book, the book itself must be produced[1]. Where the defendant had signed acknowledgments of having received money, in a day-book of the plaintiff, and the plaintiff's clerk afterwards read over the items to him, and he acknowledged they were all right, it was held that the witness might refresh his memory by referring to the book, although there was no stamp to the items on which the receipt was written; for this was only proving a verbal acknowledgment, and not a written receipt[2].

[1] Tanner *v.* Taylor, cited 3 T. Rep. 754.

[2] Jacob *v.* Lindsay, 1 East, 467.

His opinion in matters of Science.

Though witnesses can in general speak only as to *facts*, yet in questions of science, persons versed in the subject, may deliver their *opinions* upon oath, on the case proved by the other witnesses. Thus a physician who has not seen a particular patient, may, after hearing the evidence of others, be called to prove on his oath, the general effects of the disease described by them, and its probable conse-

(*d*) By eight judges, *Best*, J. dissent. in the Queen's case, Tuesday, Sept. 6.

Ch. III. s. 6. *His opinion in matters of Science.*

quences in the particular case. So a ship-builder has been permitted to give his opinion on the sea-worthiness of a ship from a survey taken by others [1]; an engineer to prove, from his own experiments, the usual effects of natural causes on a particular harbour; seal engravers, to show that an impression was from a forged seal [2]; and, persons accustomed to inspect hand-writings, to prove that a particular document appeared to be an imitation, and not a genuine hand-writing [3]; for though the evidence so given does not distinctly prove the fact, it is still general information, which the rest of mankind stand in need of, to enable them to form an accurate judgment on the subject in dispute.

[191]

[1] Thornton *v.* Royal Exch. Assur. Peak. N. P. C. 25. Charaund *v.* Angestien, Ibid. 43.

[2] Folkes *v.* Chad, cited 4 T. Rep. 498.

[3] Ante, 102.

SECTION VII.

Of procuring the Attendance of Witnesses, and their Privilege from Arrest.

Ch. III. s. 7. *Procuring their Attendance.*

To enable a man to produce his witnesses before a jury in cases where they will not voluntarily appear on his behalf, the law has provided a compulsory remedy by the writ of *subpœna*. The names of four witnesses may be put in this writ, and if the person whose testimony is required be in possession of any deed or writing, the production of which is necessary for the party, a special clause may be inserted in the writ commanding him to bring it with him (whence the writ is denominated a *subpœna duces tecum*), or a notice to produce the instrument may be given to the witness at the time of serving the *subpœna*. Under this writ, however, the party cannot compel a third person to produce any paper which constitutes a part of his title, or, as was said in one case [4] before the stat. 46 Geo. 3, which would expose him to an action; but the court, and not the witness, is

[4] Miles *v.* Dawson, 1 Esp. Cas. 405. Sed vide ante, 178, sect. 5.

Ch. III. s. 7. *Punishment for not attending.*

[192]

is to determine what papers he is compellable to produce [1]. The service of the writ of *subpœna* is made by delivering a copy to the witness, and showing him the original, at the same time tendering a reasonable sum of money for his expences according to his station in life; and if, after this, he neglect to attend, he will be liable either to an attachment, to an action at the common law for damages, or to an action on the statute of 5 Eliz. c. 9, for the penalty of ten pounds, and the further recompense given by that statute, at the election of the party injured by his negligence [2]; but, by the express provision of the statute, this further recompense is left to the discretion of the judge of the court out of which the process issues, and therefore cannot be assessed by the judge or jury at Nisi Prius.

[1] Amey v. Long, 9 East, 473.

[2] Pearson v. Iles, Dougl. 556.

In one case Lord *Kenyon* ruled, that the party who was plaintiff in the original cause could maintain no action against the witness unless he suffered the cause to be called on and was nonsuited [3]; but the Court of King's Bench have expressed a doubt of the propriety of this decision [4].

[3] Bland v. Swafford, Peak. N. P. C. 6.

[4] Barrow v. Humphrey, 3 B. & A. 600.

Remuneration.

Courts of justice take care of the interests of the witness at the same time that they are attentive to those of the suitor; and therefore, unless the *subpœna* be served a reasonable time before the day of trial, so as to enable a witness to arrange his affairs [5]; and, in civil cases, unless a sufficient sum of money be tendered to the witness, to enable him to go to, stay at, and return from, the place of trial [6], he will not be liable to punishment for neglecting to attend. But though entitled to his reasonable expences, yet, except in the case of medical men and attornies, to whom a small additional remuneration is allowed, he is not entitled to any compensation for his loss of time; and even if the party promise [7] such compensation on serving the *subpœna*, such promise being

[5] Hammond v. Stewart, 1 Stra. 510.

[6] Chapman v. Pointon, 2 Stra. 1150.

[7] Mon v. Adam, 5 M. & S. 156. Willis v. Peckham, 1 Brod. & Bing. 515.

Ch. III. s. 7. *Remuneration.*

being without consideration, will not support an action. If, having omitted to insist on receiving the necessary money at the time the *subpœna* is served, the witness ask for it when called, the judge will not compel him to be sworn till fully indemnified; and he will not, by so refusing to give evidence, wave the right which he before had, to an action against the person who caused him to be served with a *subpœna*, but may still maintain such action in case the party, not choosing to pay the money at the time of the trial, declines to examine him [1].

[1] Hallet *v.* Mears, 13 East, 15.

Witness in Custody. [193]

When a witness is in custody, or serving on board a ship, and his commanding officer will not let him attend, a *habeas corpus ad testificandum* is necessary; for which an application should be made to a judge, upon affidavit, sworn by the party applying, stating that he is a material witness [2], and in the latter case that he is willing to attend [3]. Upon this application the judge will, if he think right, grant his *fiat* for the writ; but where it appears not to be done *bonâ fide*, but with a view of removing a prisoner in execution, the court will refuse it [4]. So where the defendant is in custody on a charge of high treason [5], or as a prisoner at war [6], it will not be granted without the consent of the secretary of state. When this writ is granted, it is delivered to the officer in whose custody the witness is, who brings him up on being paid his reasonable charges. By statute 43 Geo. 3, c. 140, judges of the courts at Westminster are empowered to grant writs of *habeas corpus* to bring prisoners before courts martial, or commissioners of bankrupts, to give evidence in cases depending before them.

[2] Fortesc. 396.
[3] Rex *v.* Rodham, Cowp. 672.
[4] Rex *v.* Burbage, 3 Burr. 1440.
[5] Langston *v.* Cotton, K. B. Sittings after Trin. T. 35 Geo. 3.
[6] Furley *v.* Newnham, Dougl. 419.

Protection from Arrest.

The person of a party or witness, attending the trial of a cause, is safe from arrest in any civil action while going to, staying, and returning from the place of trial; and if arrested during this time, the court

court on which he is attending will discharge him and censure the officer. This privilege has been extended even to a party attending an arbitrator[7]; and though in strictness it does not authorize a man to loiter or deviate from the way, yet courts of justice have not been very rigid in confining the protection; therefore, where a defendant, who was attending his cause at the sittings, which was put off early in the day, stayed in court till five in the afternoon, and then went with his attorney and witnesses to dine at a tavern, and was arrested there while at dinner; the court held that taking this refreshment did not destroy his privilege, and he was discharged. So where a witness having attended the assizes, on a trial which was over about four in the afternoon, staid in the assize town till after dinner the next day, and then, while going home in a coach, was arrested about seven in the evening, the court ordered her discharge, though her residence was not above twenty miles from the place of trial.

[7] Spence *v.* Stuart, 3 East, 89.

Lightfoot *v.* Cameron, 2 Black. 1113. [194]

Hatch *v.* Blisset, Gilb. Cas. K. B. 308. 2 Stra. 986. S. C. cited.

END OF PART I.

A

COMPENDIUM, &c.

PART II.

CHAP. I.

[195] OF EVIDENCE IN GENERAL, AS REGULATED BY THE PLEADINGS, AND OTHER PROCEEDINGS IN A CAUSE.

Part II. *Variance of Circumstances.*

TO ascertain the evidence necessary to support an action, the first thing to be attended to is the form in which the action is brought, and the statement of the case as contained in the declaration. In most instances the particular circumstances of the case are set forth, but in some few the law permits the use of a certain prescribed form, wholly fictitious, and quite contrary to the facts whereon the action is founded.

In the first class of actions, the plaintiff is bound to prove the facts stated in his declaration; any material variance between that statement and the evidence, will be fatal to his cause; and though in fact he may show a good cause of action, yet not having truly stated it on the record, he fails on account of the variance.

[196] To notice in this place the numerous cases which have arisen on variances between the pleadings and the evidence, would tend to confuse rather than to convey any intelligence to the reader. It may be proper

Ch. I.
Variance in Circumstances.

proper to observe in general, that when the declaration contains impertinent matter, foreign to the cause, and which the master on a reference to him would strike out, such impertinent matter will be rejected by the court, and need not be proved. But where facts themselves unnecessary and immaterial, but at the same time not wholly impertinent, are set out in the declaration, these must be proved, though no evidence would have been required of them, had they not been alleged.

Dougl. 667.
2 Black. 1104.

This rule was more clearly expressed by Mr. Justice *Lawrence*, in the case of *Williamson* v. *Allison*, who said, "that if the whole of an averment may be struck out, without destroying the plaintiff's right of action, it is not necessary to prove it; but otherwise if the whole cannot be struck out without getting rid of a part essential to the cause of action; for then though the averment be more particular than it need have been, the whole must be proved, or the plaintiff cannot recover." Accordingly in that case, which was in *tort* for the breach of a warranty of goods, where it was charged in the declaration, that the defendant knew the goods to be of bad quality, it was held that the plaintiff need not prove the *scienter*; because, if that averment were struck out altogether, the plaintiff might still maintain his action on the warranty: but where a declaration against a sheriff, for taking the goods of a tenant without paying a year's rent to the landlord, averred that the rent was payable quarterly, whereas it was payable yearly, the variance was held to be fatal; for if the whole averment, as to the rent, had been struck out, the plaintiff could not have maintained his action, because some rent must necessarily have been averred to be due.

2 East, 452.

Williamson v. Allison, 2 East, 446.

Bristow v. Wright, Dougl. 665.

In general, dates and sums are immaterial, and being stated under a *videlicet*, the party is not bound

to

Part II. *Variance in Circumstances.*

to strict proof; but where any written instrument or record is stated, or the exact time or money is material to the merits of the cause, it then becomes necessary to prove the fact exactly as laid. Here, however, a distinction must be attended to between an allegation of substance, which it may be necessary to produce a record for the proof of, and an allegation of description, which affects to state the contents of a record. In the former case, it is sufficient if it be substantially proved; in the other, the least variance will be fatal. Thus, if it be alleged that any fact happened on a day laid under a *videlicet*, and no reference be made to any record, the variance in the day will not be fatal, unless the day be material to the merits of the action; and therefore where, in an action for a malicious prosecution, the declaration stated, that "afterwards, to wit, on the morrow of the Holy Trinity, in the 46th year, &c. at Westminster aforesaid, in the Great Hall of Pleas there, before, &c. the plaintiff was in due manner and by due course of law acquitted;" the allegation was held to be proved by the production of the record of Nisi Prius, though it thereby appeared that the acquittal took place on Tuesday next after the end of Easter Term; for the substance of the allegation was only that he was acquitted before the commencement of the action. So the statement of a *fieri facias* to have been for a debt, and 80*s.* damages sustained by reason of the detention thereof, when the writ mentioned the 80*s.* to have been given for the damages sustained as well by reason of the detention of the debt as for the costs and charges of the suit, was held to be no variance; because, in law, the costs were part of the damages sustained by reason of the detention of the debt. In these cases, however, had the plaintiff taken upon himself to describe the record by a *prout patet*, &c. it seems that

Purcel *v.* Macnamara, 9 East, 157. Contrary to Pope *v.* Foster, 4 T. Rep. 590.

Phillips *v.* Bacon, 9 East, 898.

that he would have been bound down to more literal statement. And where a writ was stated to have been returnable on a particular day, and on production it appeared the day was misstated, this, being a misdescription of the writ, was held to be a fatal variance. Green *v.* Rennet, 1 T. Rep. 656.

In an action for usury, the loan was stated to have been made on the 21st of December, when in fact it took place on the 23d; and the plaintiff was nonsuited on account of this variance. So in a plea of set-off to a bond, where the defendant is required by the statute to set out in his plea the exact sum due to the plaintiff; if he state a less sum to be due than actually is, the sum so stated may be traversed, and the defendant will fail on his plea. Carlisle *v.* Trears, Cowp. 671. Grimwood *v.* Barrit, 6 T. Rep. 460.

In the above cases, the days and sums were so material, that no form of pleading could have helped the party; but where the day or sum is not material to the merits of the cause, the plaintiff may, by stating it under a *videlicet* (as observed above) escape the danger of a variance, which might otherwise be fatal. Thus, where a declaration on a warranty of sheep stated, that in consideration the plaintiff would buy of the defendant forty-five sheep for 54*l.* 11*s.* 6*d.* the defendant promised they were sound; and it appeared in evidence, that the price was 54*l.* 12*s.* 6*d.*; this not being laid under a *videlicet*, the plaintiff was nonsuited; but had the declaration stated the purchase to have been for a large sum of money, *to wit*, 54*l.* 11*s.* 6*d.* the variance would have been immaterial. Durston *v.* Tutham, cor. Buller at N.P. cited 3 T. Rep. 67. 1 T. Rep. 240.

Contracts should, in all cases, be truly set out; if the contract be different from the declaration in any part, the whole foundation of the action fails; because the contract is entire. So where a *right* or *custom* is pleaded, it should be stated with all exceptions and modifications to which it is liable; otherwise Griffin *v.* Blandford, Cowp. 62.

Part II. *Variance in Circumstances.*

otherwise the pleading will not be supported by the evidence. If a custom be stated as that of a particular place, evidence will not be received of the like custom prevailing in a place adjoining. Thus, the custom of tithing in the parish of *A.* will not be evidence of the custom of tithing in the parish of *B.* if the custom of that parish only be pleaded [1]. But had it been laid as the custom of a larger district, including both *A.* and *B.* it would have been evidence in support of the issue [2]. In like manner the custom of one manor will not be evidence of the custom of another adjoining, unless in cases of some general law or quality, of which description is the general rule of most manors in the northern counties bordering on Scotland, and therefore called Border Law, that the tenant shall be admitted, and pay a fine on the death of every new lord [3]. On the same principle, a general custom, that one-half of a river shall be fished by the lords of the different manors on each side of the water, has been admitted as evidence of the right in the particular instance [4]; and when the dispute has been concerning the right to a particular part of a large tract of land, acts of ownership on other parts of the same tract have been also received [5], it being first shown that it was an entire waste. [6] So where a manor has been encircled by a belt of trees, some of which lay contiguous to closes belonging to different owners; the cutting of trees by the lord contiguous to the close of *A.* has been held evidence of his right to those in the same belt, contiguous to the close of *B.* [7]. And where in trespass and false imprisonment, the defendant justified, as serjeant at arms of the House of Commons, acting under the speaker's warrant, for arresting the plaintiff for breach of privilege, and the issue was upon an alleged excess of authority in the officer executing the warrant, by using an excessive and unnecessary

[1] Furneaux *v.* Hutchins, Cowp. 807.

[2] Ibid.

[3] Dean and Chapter of Ely *v.* Warren, 2 Atk. 189. Duke of Somerset *v.* France, 1 Stra. 654.

[4] Vide 1 Maule & Selwyn, 662.

[5] Barry v. Bebbington, 4 T. Rep. 514.

[6] Tyrwhitt *v.* Wynne, 2 B. & A. 554.

[7] Stanley *v.* White, 14 East, 332.

unnecessary military force, and breaking the plaintiff's house after demand of entrance and refusal; evidence was received of acts of violence by the mob, committed in parts adjacent, though out of view and hearing of the plaintiff in his house, such violence appearing to be connected with the same purpose as actuated those about the plaintiff's house[1].

[1] Burdett v. Coleman, 14 East, 183.

In cases where the law gives a general form of declaration, as in trover, ejectment, &c. the plaintiff has only to prove his title to recover, and by a fiction of the law, that title is considered as proving the case stated on the record, and the jury are directed to find the facts so stated.

Variance in Place.

Actions may be again considered as they are *local* or *transitory*. Local actions must, as the term implies, be laid in the county where the cause of action arises. The county is in this case a material circumstance in the cause, and unless the plaintiff prove it as laid in the declaration, the variance is fatal to his action.

But though the *county* is material in all local actions, yet the *place* within it is not always so material; and where this is the case, the place mentioned in the declaration, if named merely as a venue and not as a local description of the injury, need not agree with the proof. Therefore, where in an action for a nuisance to the navigation of the Irwell, by diverting the water from it, the declaration stated that the plaintiffs, to wit, *at A.* were proprietors of a certain river *there* called the Irwell, and that the defendant *at A. aforesaid*, erected a weir, and thereby diverted the water from the river, and injured the navigation; it was held to be sufficient to prove that such an injury was done to the navigation on that river at any place within the county; for as it was unnecessary to give a local description either of the property, or of the thing which caused the injury, and the

Mersey and Irwell Navigation Comp. v. Douglas, 2 East, 497.

Part II. *Variance in Place.*

the declaration did not give a particular description of either, *A.* was considered merely as a venue, and therefore immaterial.

[199]

In those actions which are *transitory*, the plaintiff has the privilege of electing any county he pleases, and here, as both the place and county laid in the declaration are merely *formal*, it is not necessary that either should agree with the proof. Thus where in an action for running down the plaintiff's boat, the declaration stated the injury to have been done *near* Half-Way Reach, in the River Thames; and it was proved to have happened *in* Half-Way Reach; the proof was held to support the declaration. So where an action of *assumpsit* was brought, on an agreement to procure the plaintiff a booth at a horse-race, and the declaration stated that there was a race upon Barnet Common, *in the county of Middlesex*; and it appeared in evidence, that the whole of Barnet Common was in *Hertfordshire*; this was also held to be no variance.

Drewry v. Twiss, 4 T. Rep. 558.

Frith v. Gray, Ibid. 561, note.

In these transitory actions, however, the defendant may change the venue by motion to the court, founded on an affidavit that the cause of action arose wholly in another county; and the plaintiff cannot bring it back to the county where it was originally laid, without undertaking to give material evidence in that county. This undertaking makes the action in some degree *local*, and unless the plaintiff comply with the condition, he will be nonsuited on the trial. The defendant therefore should, in all cases where the plaintiff has so undertaken, be prepared to produce the rule at the trial, in order to bind the plaintiff to his engagement.

Santler v. Heard, 2 Black. 1031.

1 Sid. 442.

[200]

It was formerly held, that on an undertaking of this nature, the plaintiff could not give any evidence which arose in another county, but that all his evidence must arise in the county wherein the venue

was

was laid; but it is now deemed sufficient if he give any one material piece of evidence arising in that county; and even in actions in their nature local, if the different facts which constitute the right of action arise in different counties, the plaintiff has his election in which to lay his cause.

Salk. 669. 2 T. Rep. 241.

A deed enrolled in Middlesex, a commission of bankruptcy tested there[1], or, as was held in one case[2], the production of a rule for payment of money into court in the action, though obtained after the rule to change the venue was discharged, is a sufficient compliance with the undertaking to give material evidence in that county: but in a subsequent case[3], the Court of Common Pleas held, that only the proof of facts necessary to sustain the action, and not any matter in answer to the plea, would be sufficient; and therefore, where the defendant pleaded a tender, and the plaintiff replied and proved a subsequent demand and refusal within the county, they determined that he had not satisfied the undertaking.

[1] Kensington *v.* Chantler, 2 M. & S. 36.
[2] Watkins *v.* Towers, 2 T. Rep. 275.
[3] Cockerill *v.* Chamberlain, 1 Taunt. 519.

So it has been said, that proof of the cause of action arising in a foreign country, is sufficient[4], though the safer way in this case seems to be to apply to the court to discharge the rule[5]. In one case where the cause of action arising in *A.* the venue was laid in *B.* and an attempt was made to change it to *C.* the Court of Common Pleas refused to change the venue[6]; and in another late case[7], in the same court, where the venue being laid in London, the defendant moved to change it to Lancashire; on which the plaintiff produced an affidavit, that the cause of action arose in Surrey, Middlesex and London, being for goods sold in Middlesex, and delivered, some in London, and others in Surrey, the court retained the venue upon the plaintiff undertaking in the alternative to give material evidence

[4] Gerard *v.* Roebuck, 1 H. Black. 280. M'Clure *v.* M'Keand, 2 Taunt. 197. S. P.
[5] Calliaud *v.* Champion, 7 T. Rep. 293.
[6] Collins *v.* Jacobs, 3 Bos. & Pul. 597.
[7] Hunt *v.* Bridgewater, 1 Taunt. 259.

Part II.
Variance in Place.

evidence in one of those counties; but in a case similar in its circumstances to that of *Collins* v. *Jacobs*, above referred to, the Court of King's Bench refused to bring back the venue without the usual undertaking [1]. The bare circumstance of the witnesses residing in the county where the venue is laid, will not alone satisfy the undertaking [2].

[1] Price *v.* Woodburne, 6 East, 433.

[2] Santler *v.* Heard ut sup.

Order for Particulars of Demand.

Another method by which the defendant may confine the generality of the plaintiff's statement, and consequently narrow his proof, is by obtaining a judge's order for the particulars of the plaintiff's demand. This is granted almost as of course in most actions founded on contract, and when a bill of particulars is delivered under the order, the plaintiff will not be permitted to give evidence at the trial of any demand not contained therein. Thus if, in a bill of particulars so delivered, the plaintiff state his cause of action to be on a promissory note only [3], and it appear that the note is void for want of a stamp, the plaintiff cannot go into evidence of the consideration whereon it is founded, though the declaration contain counts on such consideration; but on such a particular he may recover the interest due on the note, as well as the principal secured by it [4]. Again, where the declaration contained counts for goods sold and delivered, and for money had and received, and the plaintiff delivered a particular merely for horses sold *to the defendant*; the court held that he was precluded from going on his count for money had and received, and proving that the defendant had sold horses on his behalf to third persons, and received the money for them [5]: but a mere error in the statement of the time when work was done, where such error cannot mislead the defendant, will not prevent the plaintiff from recovering [6]. If the plaintiff has inadvertently delivered a particular not applicable to his case, he should apply by summons to a judge

[3] Wade *v.* Beasley, 4 Esp. Cas. 2.

[201]

[4] Blake *v.* Lawrence, 4 Esp. Cas. 147.

[5] Holland *v.* Hopkins, 2 Bos. & Pul. 243.

[6] Millwood *v.* Walter, 2 Taunt. 224.

a judge to amend it, for it was in one case held by the Court of Common Pleas, that he could not do so by merely delivering a second bill of particulars [1].

[1] Brown *v.* Watts, 1 Taunt. 353.

As the rules of pleading allow, in some cases, a general form of declaration to the plaintiff, so in many actions the defendant is allowed a general form of plea, which disputes every thing in the declaration, except those legal fictions which are considered as indisputable; and puts the plaintiff upon proving the whole of the case he has stated in the record.

In other forms of action, on the contrary, the defendant is by the rules of the common law obliged to select a particular part of the declaration in his plea, and the plaintiff is not compelled to prove more than the fact which is denied by it. Since the statute for the amendment of the law, however, this distinction is in a great measure done away; for, though the defendant cannot by one compendious plea deny the whole of the declaration, he may, by leave of the court, plead several distinct pleas to each part of it; and so put the plaintiff on proving the whole.

4 Anne, c. 16.

[202]

Rule to pay Money into Court.

But though the defendant may, by the *general issue* alone, in actions where such plea is allowed, put the whole of the case stated in the declaration in issue, yet there are some acts by which he is considered as partially admitting the declaration, notwithstanding that plea. In all cases of contract, where the damages are certain and liquidated, the defendant may at the time he pleads, obtain a rule for leave to pay so much money into court as he admits to be due; and this payment so far controls the general issue, as to prevent the defendant from disputing that he did contract in the manner stated in the counts on which money is so paid, and reduces the question between the parties to the quantum of damages which the plaintiff is entitled to recover.

Part II. *Rule to pay Money into Court.*

Thus if, in an action on a bill of exchange, the defendant pay money into court on the whole declaration, the bill, being admitted by this act of the defendant, need not be proved by the plaintiff on the trial [1]. So where a defendant paid 5 *l.* into court on a declaration against him as a carrier, stating a general contract to carry the plaintiff's goods, it was held that the plaintiff was not bound to give further evidence than the production of the rule, and proof that the goods were of greater value than the money paid into court; and that it was not competent to the defendant to prove a general notice, that he "*would not be responsible for more than* 5 *l.* for any species of property contained in any article lost or damaged, unless the same were booked and paid for according to the value;" for that by paying money into court, the defendant had admitted the contract, as stated in the declaration, and that he had undertaken to the full amount of the goods [2]. But in a subsequent case [3], where the notice was, "that *no more than* 5 *l. would be accounted for*, for any goods or parcels, unless entered as such, and paid for accordingly," the court held that the plaintiff might state the contract of the defendant in general terms, and that by paying money into court on such a general declaration, the defendant would not admit more than his contract for the safe carriage of the goods, nor preclude himself from showing that he was, by reason of the notice, not liable to damages beyond that sum; for that the notice did not alter the contract for the safe carriage of the goods, but only limited the amount of the damages, in case the contract should be broken. In this latter case the court said that the case of *Yate* v. *Willan* could not be supported in its full extent; for although the payment of the money in that case did admit the contract as stated in the declaration, it did not admit a contract incompatible with

[1] Gutteridge v. Smith, 2 H. Black. 374.

[203]

[2] Yate v. Willan, 2 East, 128.

[3] Clarke v. Gray; Marsden v. Gray, 6 East, 564.

with the restrictive provision, as to the amount of damages to be recovered in case of loss. And in a subsequent case, where on a declaration containing counts on a policy of insurance, and for money had and received, &c. the defendant paid money into court generally, it was held that he did not thereby preclude himself from disputing his liability beyond such payment, for goods which were not loaded according to the terms of the policy[1].

[1] Mellish *v.* Allnutt, 2 M. & S. 106. [204]

If an action be brought for a demand compounded of different items, some of which are founded on good and others on illegal considerations, and the defendant pay money into court on the whole declaration, the plaintiff will not be permitted to apply the money so paid in satisfaction of the illegal demand, and to recover the other; for, the payment of money into court is an admission of a legal demand only, and not of one founded on a corrupt consideration[2].

[2] Ribbans *v.* Cricket, 1 Bos. & Pul. 264.

The payment of money into court under a rule of court, being a proceeding in the course of a cause, it is obviously the duty of the plaintiff not to call for evidence of it; and if, in violation of this duty, he puts the defendant on this proof, such evidence will not entitle the plaintiff to the reply[3].

[3] Reg. Gen. C. B. Hil. 50 Geo. 3, 2 Taunt. 267.

Plea of Tender.

Similar in effect is the plea of tender, by which the defendant admits that the plaintiff has some cause of action, and therefore he cannot afterwards call on the plaintiff to give further evidence than is necessary to show the amount of the debt. Thus, if in an action founded on a promise to pay the debt of a third person, (which, by the statute of frauds, must be in writing,) the defendant plead a tender, the plaintiff will not be called on to prove the promise, but only the amount of the debt due from the person on whose behalf the promise was made[4].

[4] Middleton *v.* Brewer, Peake's Cas. 15.

Pleas in abatement.

Besides the pleas which go to the merits of the action, there are others which only *abate* it, on

Part II. *Pleas in Abatement.*

account of some disability in one of the parties, or informality in the proceeding; and as these do not deny the right of action, they must give the plaintiff a better writ.

It would be quite foreign to the purpose of the present work to go through the several matters which may be pleaded in abatement; it is sufficient to observe, that the issue in most of them when traversed, lies on the defendant, who must prove the facts stated in his plea. Nevertheless, in actions of *assumpsit*, and other actions where damages are to be recovered, the plaintiff must prove his cause of action to ascertain the amount of the damages.

[205]

A distinction which has been taken between actions of contract and actions of *tort*, may also be properly noticed in this place. In the former, if one of several partners or joint-tenants bring an action alone, the defendant may give the right of the others in evidence on the *general issue*, and the plaintiff will on such evidence be nonsuited[1]. But if an action of *tort* be brought by one partner alone, this must be pleaded in abatement, or else the defendant will be precluded from proving the fact for any other purpose than that of taking off a moiety of the damages[2]. If the defendant be liable jointly with other persons who are not joined, and is sued in *assumpsit* or other action founded on contract, this must be pleaded in abatement[3]. In some cases[4] where actions against carriers have stated facts which implied a contract, though the form adopted has been *tort*, it has been considered that the defendant was equally entitled to this plea, as if an action of *assumpsit* had been brought; but it has been since held by the Court of King's Bench, that where a person is sued merely on a common law duty, as a carrier on the custom of the realm, &c. it is no answer for him to say, that another person was jointly liable with him[5]. It was before

[1] Leglise *v.* Champante, 2 Stra. 820.

[2] Bloxham *v.* Hubbard, 5 East, 407.

[3] Rice *v.* Shute, 5 Burr. 2611.

[4] Vide Buddle *v.* Wilson, 6 T. Rep. 369.

[5] Ansell *v.* Waterhouse, K. B. Trinity, 57 Geo. 3. Vide Cooper *v.* Smith, 4 Taunt. 802.

before held, that in actions founded on a mere tortious act or trespass committed by several, there can be no such plea, for each *tortfeasor* is separately liable [1].

In actions, however, founded on a mere contract brought against several persons, the plaintiff on the general issue must recover against all or none, and this whether he declares in *assumpsit* or *tort*; and therefore if a declaration in *tort* alledge a deceit to have been effected on the plaintiff by means of a warranty made by two defendants upon a *joint sale* by them both, the plaintiff cannot recover upon proof of a contract of sale and warranty by one only. On the contrary where the *tort* or negligence, and not the mere breach of contract, is the ground of action; as where several being employed to remove a hogshead of wine for certain reward to be paid to one, and certain other reward to be paid to the others; the wine was spilt by negligence, and an action in *tort* was brought against all, there the court held that one only might be found guilty, and the others acquitted.

[1] Powell *v.* Layton, 2 N. Rep. 365.

Weal *v.* King, 12 East, 452.

Govett *v.* Radnidge, 3 East, 62.

Sed vide Weal *v.* King, supra; and Max *v.* Roberts, 2 N. Rep. 454, and 12 East, 89.

[206]

CHAP. II.

OF THE EVIDENCE IN ACTIONS OF ASSUMPSIT.

Part II.

THE action of *assumpsit* takes the largest range of all those which are founded in contract; for whatever duty arises from the acts of the parties without any actual contract between them, from a parol agreement, or from a contract in writing not under seal, the performance of it is properly enforced by this species of action.

The plea of *non assumpsit* putting the whole case in issue, makes it incumbent on the plaintiff to prove all the circumstances stated in his declaration. In this action, therefore, if the plaintiff alledge any fact by way of consideration for the promise on which the action is founded, or the performance of any act which was necessary to be done by him previous to his calling on the defendant to complete his part of the contract, he is obliged to prove it.

SECTION I.

Evidence in Actions on written Contracts.

Ch. II. s. 1.

IF the contract be in writing, the hand-writing of the party against whom it is to be given in evidence, must be proved either by the subscribing witness, or by the means before pointed out, and care should be taken that a proper agreement stamp is impressed upon it, otherwise it will not be admitted in evidence for the purpose of proving a contract, or the

Vide ante, 95.

[207]

terms

terms of it; and even if the party against whom it is offered in evidence, has wrongfully destroyed it before it has been stamped, no parol evidence can be given of its contents[1]. But in a sessions case, where an agreement was made on unstamped paper, for the service of the pauper for a certain time, and the parties continued together for some time afterwards under a parol agreement, the Court of King's Bench held that the sessions might look at the paper for the purpose of seeing whether the time had expired[2].

[1] Rippener *v.* Wright, 2 M. & S. 478.

[2] Rex *v.* Inhabitants of Pendleton, 15 East, 449.

In cases where a proper stamp has not been impressed, and only one part has been signed, which continues in the hands of the defendant, the court in which the action is brought will make a rule on him to produce it at the Stamp Office, for the purpose of being stamped at the expence of the plaintiff[3].

[3] Bateman *v.* Phillips, 4 Taunt. 157.

Stamp Duties on Agreements.

By statute 23 Geo. III, c. 58, s. 1, a stamp duty of 6*s.* is laid "on every skin or piece of vellum or parchment, or sheet or piece of paper upon which any agreement shall be engrossed, written, or printed, whether the same shall only be evidence of the contract, or obligatory upon the parties, from its being a written instrument;" and by subsequent statutes additional duties are imposed.

The 4th section of the first act provides that the duty shall not extend to any memorandums or agreements of the following description, viz.

1st. Any memorandum or agreement for any lease at rack rent, of any messuage under the yearly rent of 5*l.*

2d. For the hire of any labourer, artificer, manufacturer, or menial servant.

3d. For or relating to the sale of any goods, wares, or merchandizes.

4th. Where the matter of memorandum or agreement shall not exceed the sum of 20*l.*

Part II. *Stamp Duties.*

5th. Or any memorandum or agreement made in Scotland, that shall be stamped with the duty required on deeds in Scotland.

A further provision is made by the statute 32 Geo. 3, c. 51, by which it is enacted that the duty shall not extend to any letter or letters passing by the post between merchants or other persons carrying on
[208] trade or commerce in this kingdom, and residing at the distance of fifty miles from each other, for or by reason of such letter or letters containing an agreement in respect to any merchandize, notes, or bills of exchange, or evidence of such an agreement; but that such letter or letters may be evidence of such agreement as aforesaid, though the same be not stamped.

But it is provided that this last act shall not extend to any letter or correspondence passing between persons who are residents of the same town or city, nor to any letter or correspondence written, or so passing between persons not at the time of writing or sending thereof at the actual distance of fifty miles from each other (*a*).

The

(*a*) By 44 Geo. 3, c. 98, schedule (A.) the old duty is repealed, and a duty of 16*s.* imposed, where the length of the agreement does not amount to thirty common law sheets; and for every entire quantity of fifteen common law sheets, a further duty of 16*s.* The same exemptions are continued as are contained in the stat. 23 & 32 Geo. 3, except those of agreements for matters *not exceeding* the value of 20*l.*; and of agreements made in *Scotland*. The former is in some measure altered by the enacting clause laying the duty on agreements where the matter thereof shall be *of the value* of 20*l.* or upwards, and the latter is wholly omitted, and agreements made in *Scotland* subjected to other duties. The following exemptions are also added, viz. 1. "Label, slip, or memorandum, containing the heads of insurance to be made by the corporations of the Royal Exchange Assurance, or London Assurance, or the corporations of the Royal Exchange Assurance of Houses

The first of these acts of parliament is so extensive in its operation, and the cases exempted so clearly expressed, that but few questions have arisen on its construction. It has been held that a written agreement by a broker who buys goods for his principal, to indemnify him from any loss by the resale[1], or a guarantee by a third person for payment of goods to be thereafter purchased[2], or an agreement between two persons that one shall take a share in goods bought by the other on their joint account, and that the profit shall be divided or the loss borne between them[3], need not be stamped, all these being contracts *relating to the sale of goods*, and therefore exempted by the 4th section of the act. But an agree-

[1] Curry *v.* Edensor, 3 T. Rep. 524.

[2] Warrington *v.* Furber, 8 East, 242.

[3] Venning *v.* Leckie, 13 East, 7.

[209]

Houses and Goods from Fire; and London Assurance of Houses and Goods from Fire;" and 2. "Memorandum or agreements made between master and mariners of any coasting vessel for wages."

By stat. 48 Geo. 3, c. 149, schedule Part I. all former duties are repealed, and the following duties take place after the 10th Oct. 1808, viz. On any agreement, or a minute, or memorandum thereof made in *England* under hand only, or made in *Scotland* without any clause of resignation, where the matter thereof shall be of the value of 20*l.* together with every schedule, receipt, or other matter endorsed thereon or annexed thereto, where the same shall not contain more than 1080 words, (being the amount of fifteen common law folios or sheets of seventy-two words each,) 16*s.*; and where the same shall contain more than 1080 words, 1*l.* 10*s.* and for every entire quantity of 1080 words contained therein over and above the first 1080 words, a further progressive duty of 1*l.* provided that where divers letters shall be offered in evidence to prove any agreement between the parties who shall have written such letters, it shall be sufficient, if any of such letters shall be stamped with a duty of 1*l.* 10*s.* although the same shall in the whole contain twice the number of 1080 words or upwards. The exemptions of the former act are continued. The stat. 55 Geo. 3, c. 184, increases the duty of 16*s.* on agreements containing 1080 words to 1*l.*; on agreements containing more to 1*l.* 15*s.*; for every entire quantity of 1080 words, a progressive duty of 1*l.* and extends the duty on letters contained in the proviso to 1*l.* 15*s.*

ment

Part II. *Stamp Duties.*

ment for things which are not in existence at the time, as for machines to be made [1], or for the sale of all the hops which shall be grown upon a certain number of acres of land to be delivered in pockets at a certain place [2], or for the sale of growing turnips [3], does not fall within the exception; for, in the first instance, the work forms a part of the contract; and in the other, the vendee takes an interest in the profits of the vendor's land. As to what shall be deemed an agreement amounting to 20*l.* it has been held, that if a man at a sale of growing turnips purchase several lots, none of which alone amounts to 20*l.* though altogether they would exceed that sum, the agreement need not be stamped, though it would be liable for any one amounting to 20*l.* as being an interest in the land, and not a mere sale of goods [4]. On the like principle it was determined, where two men having laid a wager, afterwards agreed to double it, that to recover the double amount two stamps should be impressed on the paper, each being separate transactions [5].

On the act of the 32 Geo. 3, it has been holden, that if a son, managing his mother's trade, write a letter to a creditor residing above fifty miles from him, thereby promising to pay the debt, such letter is exempted, as being between two persons carrying on trade [6].

Where a paper writing is signed by several persons, each agreeing for himself only, it is as several agreements, and requires several stamps; but if only one stamp be impressed, and it appear that such stamp was put on for the purpose of making it binding on any one individual, it will be evidence against him, though there are no stamps to make it evidence against the others [7]; and where several enter into an agreement to subscribe for a certain purpose, it is but one agreement for the purpose of the stamp duty, though several as to each [8].

[1] Buxton *v.* Bedal, 3 East, 303.

[2] Waddington *v.* Bristow, 2 Bos. & Pul. 452.

[3] Emmerson *v.* Heelis, 2 Taunt. 38.

[4] Ibid.

[5] Robson *v.* Hall, Peake's N. P. Cas. 127.

[6] Mackenzie *v.* Banks, 5 T. Rep. 176.

[7] Doe dem. Copley, bart. *v.* Day, 13 East, 241.

[8] Davies *v.* Williams, 13 East, 232.

Several

Several cases have arisen in which it has become a question how far the alteration of an instrument, after it has been stamped, affects the stamp so as to render a fresh one necessary. The general rule which has been laid down is, that if the alteration is merely to correct a mistake in the agreement and to carry into effect the original intention of the parties, no new stamp is necessary; but where a new term is added, and in fact a new agreement made, such new agreement will not be valid till re-stamped. Thus it has been held, that adding the words "or order," which had been accidentally omitted in a bill of exchange [1]; or turning a promissory note into a bill, as originally agreed upon [2]; or altering the name of the port from whence the certificate of a ship's registry was granted, when a wrong port had been inserted by mistake [3]; or rectifying the name where a mistake was made in declaring the interest on a policy [4], does not render a fresh stamp necessary. So [5] where an umpire, having made his award, altered the sum after the expiration of the time for publishing it, the court held that the alteration being a mere nullity, the award as at first made might be enforced. But where the defendant having subscribed a policy of assurance, which in the printed part was *on ship and goods*, but by a written note in the margin was restrained to *ship and out-fit*, a memorandum was afterwards inserted in the policy as follows, viz. "It is hereby agreed that the interest in this policy of insurance shall be on ship and goods, instead of ship and out-fit, as originally declared;" the court held that the original risk being so altered the policy ceased to be a valid instrument, and that no action could be maintained upon it, either in its original or its altered form, until a new stamp was impressed upon it [6]. The like decision [7] took place where a bill, having been drawn on a proper stamp at twenty-one days, was, while in the hands of the drawer,

[1] Kershaw *v.* Cox, 3 Esp. 246; cited 10 East, 435, and 15 East, 417.

[2] Webbe *v.* Maddocks, 3 Campb. 1.

[3] Cole *v.* Parkin, 12 East, 471.

[4] Robinson *v.* Tourney, 1 M. & S. 217.

[5] Henfree *v.* Bromley, 6 East, 309.

[6] French *v.* Patten, 9 East, 351.

[7] Bowman *v.* Nichol, 5 T. Rep. 537.

Part II. *Stamp Duties.*

drawer, altered to fifty-one days by consent of all parties, and by the like consent was, after the time for payment was out, altered again to twenty-one days; it being considered that the time of payment being spent when the second alteration was made, it was a new instrument, and required a new stamp. So where [1] a promissory note, being made payable as for "value received" generally, was, after it had been delivered, altered by adding the words "for the good-will of a house in trade," this also was held to be such an alteration as to require a fresh stamp.

[1] Knill *v.* Williams, 10 East, 431.

In two late cases the Court of King's Bench took a distinction between a paper *signed* by the agent of one of the parties, and by him delivered over to the other party, and an *unsigned* paper so delivered. And where lands were let by auction, and the auctioneer delivered to the bidder of one parcel, a written paper, "One piece of land, &c. for a term of ten years to Mr. W. T." such paper not having any signature, it was held that it was neither an agreement, nor evidence of it, and therefore that parol evidence might be given of the letting [2]; but where to a similar paper, delivered to another bidder, the auctioneer subscribed his name, the court held that the paper was liable to a stamp duty, and that no parol evidence could be given without first producing the agreement [3].

[2] Ramsbottom *v.* Tunbridge, 2 M. & S. 434.

[3] Same *v.* Mortley, Ibid. 445.

The Stamp Office having fixed upon different dies to denote the different denominations of stamps, no other but that appointed for the instrument which is to be produced in evidence, will be sufficient to give it validity. An agreement stamp will not do for a deed [4] or lease though not under seal [5], though of equal value. But by statute 37 Geo. 3, c. 146, instruments on stamps of different denominations, but of greater or equal value than the proper stamp, may, on payment of the duty, and 5*l.* penalty, be stamped with the proper stamp.

[4] Robinson *v.* Drybrough, 6 T. Rep. 317.

[5] Semb. Good-title dem. Estwicke *v.* Way, 1 T. Rep. 735. Vide post, [243].

Instruments

Ch. II. s. 1. *Statute of Frauds.*

Instruments unstamped, or on stamps of less value, may be stamped on payment of the duty, and 10*l.* penalty for each skin; and if written on unstamped paper, and it shall appear to the commissioners by oath or affirmation, that it was so written by accident, inadvertency, urgent necessity, or unavoidable circumstances, and without intention of fraud; the commissioners are authorized, within sixty days after the making of the instrument, to remit the penalty, or such part as they may deem proper (*b*).

[210]

Bills of exchange and promissory notes are excepted from the operation of these clauses, being provided for in a manner of which I shall hereafter take notice.

By the rules of the common law every contract might be proved by parol evidence; but by the statute 29 Car. 2, c. 3, commonly called the statute of Frauds, it is enacted, That no action shall be brought whereby,

1. To charge any executor or administrator, upon any special promise, to answer damages out of his own estate. Sect. 4.

2. Or to charge the defendant to answer for the debt, default, or miscarriage of another.

3. Or to charge any person upon any agreement made in consideration of marriage.

4. Or upon any contract for the sale of lands, tenements, hereditaments, or any interest in or concerning the same.

5. Or upon any agreement that is not to be performed within one year from the making thereof, unless the *agreement* upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, signed by the party to be charged

[211]

(*b*) The stat. 44 Geo. 3, c. 98, s. 24, grants a similar indulgence in case the instrument be brought to the office within twelve months.

therewith,

Part II. *Statute of Frauds.*

therewith, or by some other person by him thereunto lawfully authorized.

Sect. 17.

And further, That no contract for the sale of any goods, wares, and merchandizes, for the price of 10*l.* sterling, or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold and actually receive the same; or give something in earnest, to bind the bargain, or in part of payment; or that some note or memorandum, in writing, of the said *bargain*, be made and signed by the parties to be charged by such *contract*, or their agents thereunto lawfully authorized.

The first provision of this statute as to executors, &c. is so plain, that no serious question has ever yet arisen, nor probably ever will arise, on the construction of it: but what shall be deemed a promise for the debt of another, has often been the subject of controversy.

[212]

The general question in all these cases is, Whether the person, for whom the promise is said to have been made, was ever liable? for if he were, and the promise of the defendant is *collateral* to and in aid of his credit, and not a *direct* promise to be answerable in the first instance, it is void[1]; whether made before or after the delivery of the goods, or performance of the other benefit, for the satisfaction of which it is intended as a security.

[1] B. N. P. 281. Matson v. Wharam, 2 T. Rep. 80.

Thus, if one man request another to supply goods to a third person, saying, if he does not pay you I will[2]; I will be bound for the payment of the money as far as 800*l.* or 1,000*l.*[3]; or other words, signifying that he does not consider himself as the principal debtor, the promise will not bind him, unless reduced into writing; and although the promise be to pay the debt of another, and also to do something else, still no action is maintainable on it[4]: but if it plainly appear that the person promising intended that he for whose

[2] Jones v. Cooper, Cowp. 227.

[3] Anderson v. Hayman, 1 H. Black. 120.

[4] Chater v. Becket, 7 T. Rep. 201.

whose use the articles were supplied should never be charged with them by the person of whom they were bought, and the creditor never considered such third person as his debtor, a parol promise is binding, for there is no debt, default, or miscarriage in the third person.

In these cases it will often be very important to see to whom credit was originally given by the seller of the goods: and though his books, or the bill of parcels, cannot be evidence for him, yet if he originally charged the third person, that will be strong evidence against him: Where the books are in possession of the plaintiff, notice should be given to him to produce them, that they may be read on the part of the defendant, or parol evidence given of their contents, if he is not made debtor in them.

[213]

On a promise to be answerable to *A.* for any goods he had or might supply *B.* with, to the amount of 100 *l.* the Court of King's Bench held that the person making it remained liable till he gave notice that he would be no longer answerable, although goods to the specified amount had been delivered and paid for[1]; but where the promise was to guarantee the payment to the extent of 60 *l.* at quarterly payments, bill two months, for goods to be purchased, it was determined not to be a continuing guarantee[2]; and if the promise be to guarantee a bill for a given amount, the party will not be liable to that extent on a bill given for a larger sum[3].

If an agent buy goods at an auction, and do not name his principal[4]; or an auctioneer employed to sell goods by the creditors of the owner, when the landlord enters to distrain, promise, in consideration of his desisting, to pay the rent[5]; or a third person, in consideration of the holder of any commodity, on which he has a lien, delivering it up, promise to pay the value[6]; in all these cases no written memorandum

[1] Merle *v.* Wells, 2 Campb. 413. Mason *v.* Pritchard, Ib. 436.

[2] Melville *v.* Haydon, 3 B. & A. 593.

[3] Phillips *v.* Astling, 2 Taunt. 206.

[4] Simon *v.* Motivos, 3 Burr. 1921.

[5] Williams *v.* Leaper, Ib. 1886.

[6] Castling *v.* Aubert, 2 East, 325.

Part II. *Statute of Frauds.*

dum is necessary; for, in the first case, no credit at all was ever given to the third person; and, in the others, there is an entire new consideration, detrimental to the plaintiff, and moving from him to the defendant, and on which the third person could not be sued. Again, whenever a person is under a moral obligation to make satisfaction for a benefit which another has actually received, and he promises to pay it, the promise is binding upon him, though not reduced into writing: as when a pauper is taken ill, and an apothecary sent for without the knowledge of the overseers, who attends and cures her, and the overseers promise to pay his bill, this promise is binding upon them [1]; and even if one of the overseers *only*, who has the management of the poor, make the promise, both overseers are liable [2].

[1] Watson *v.* Turner and another, Bul. N. P. 281.

[2] S. C. Bul. N. P. 129.

[214]

Cases where no debt was due from the third person, and where there was no default or miscarriage by him, as actions of *tort*, trespass, or the like, are not within the statute; and if in such case a third person verbally promise to pay the plaintiff a sum of money, in consideration of his withdrawing the record, it will be binding [3].

[3] Read *v.* Nash, 1 Wils. 305.

The sale of standing grass [4], or growing turnips [5], has been held to be within the statute, as conveying an interest in the land, (though a different decision had formerly taken place as to the sale of standing timber [6];) but where potatoes were completely grown [7], and the contract was that the purchaser should get them and take them away immediately, the court considered them as a mere chattel, and that therefore no written contract was necessary.

[4] Crosby *v.* Wadsworth, 6 East, 602.

[5] Emmerson *v.* Heelis, 2 Taunt. 38.

[6] Vide Bul. N. P. 282; 1 Lord Raym. 182.

[7] Parker *v.* Staniland, 11 East, 362.

That part of the clause which makes void parol promises, in consideration of marriage, was at one time thought to affect mutual promises to marry [8]; but, by later decisions, it has been held to extend only to those cases where a father or other person promises

[8] Philpot *v.* Wallet, 3 Lev. 63.

promises to pay a sum of money by way of portion to the person married [1].

The next provision requiring a memorandum in writing, where the contract is not to be performed within a year, does not appear to afford much room for doubt or discussion; the obvious intention of the legislature was, that those agreements which were, *in all events*, to remain unperformed, or not fully completed for a year together, should rest upon some better evidence than the frail memory of man, and such cases will not be taken out of the statute, though the contract has been in fact partly performed within that time [2]. But where it is from the nature of the promise itself, uncertain whether it will be performed within a year or not, it has been held not to be within the statute, though the contingency does not in fact happen till after that time; and therefore, if a man promise to pay a sum of money when a ship arrives [3], or when he shall be married [4], or to leave it at his death [5], these promises, if founded on good consideration, are binding, though not in writing.

[1] Cork *v.* Baker, 1 Stra. 34.

[2] Vide Boydell *v.* Drummond, 11 East, 142.

[215]

[3] Anonymous, 1 Salk. 289.

[4] Case cited in Com. Rep. 50.

[5] Benton *v.* Emblers, 3 Bur. 1278.

The seventeenth clause, viz. that relating to the sale of goods of the value of 10*l.* and upwards, has given rise to the most discussion, and some contradictory cases are to be found upon it. There seems to be no reason for confining this clause to contracts to be performed immediately, and excluding executory contracts from the operation of it; yet such a construction at one time prevailed in Westminster-Hall; and if the thing sold were to be delivered at a distant time, it was held not to be within the statute [6]. But, by a modern decision [7], this distinction has been overruled, and this clause of the statute is now held to extend to all contracts for the *sale of goods* of the value of 10*l.* or upwards, whether they are to be delivered immediately, or at a future time. It is

[6] Vide Simon *v.* Metivier, B. N. P. 280. 3 Bur. 1921.

[7] Rondeau *v.* Wyatt, 2 H. Black. 63.

Part II. *Statute of Frauds.*

still held, that where work is to be done, as where a chariot is to be built[1], this not being a mere contract of sale, but, in some degree, founded upon the work and labour to be performed, is not within the statute.

Another case was also determined before that of *Rondeau* v. *Wyatt*, in which it was held, that where an agreement was to sell corn by measure, which was unthrashed at the time of the agreement, it was not within the statute[2]. Lord *Loughborough*, in delivering his judgment on the case of *Rondeau* v. *Wyatt*, distinguishes this case from the one then before the court, by observing that some work was to be done to the corn; but he admits this to be a very nice distinction, and it must be observed, that at the time this case was determined, the general received opinion was, that all executory contracts were excluded from the operation of the statute; and the case appears to have been principally decided on this ground.

In cases which are within the operation of the statute, and where the terms of it are not complied with, the contract, while it remains unexecuted, is void altogether[3]; neither the buyer nor the seller can enforce the performance of it: and even if confessed in an answer to a bill in equity, still if the statute be insisted upon, that court, it should seem, from the majority of the cases[4], will not decree a performance; and it is settled that no action at law can be maintained on such admission[5]; but where the agreement has been executed, the statute does not apply; and therefore where a tenant agreed with his landlord, that if he would accept another person as tenant in his place, he would pay him 40*l.* out of 100*l.* which he was to receive from such person for the good-will, and in fact received the 100*l.* from him, he being cognizant of the agreement, the court held

[1] Towers v. Osborne, 1 Stra. 506. See also Groves v. Buck, 3 M.&S. 178.

[216]

[2] Clayton v. Andrews, 4 Bur. 2101.

[3] Alexander v. Comber, 1 H. Blac. 20.

[4] Vide cases cited in Rondeau v. Wyatt, and 1 Fonbl. Treat. Eq. 168.

[5] Rondeau v. Wyatt, ubi supra. Griffiths v. Young, 12 East, 513.

held that the 40 *l.* might be recovered by the landlord as money had and received to his use.

The weighing off goods in the presence of the buyer's servant has been held a sufficient delivery within the 17th clause [1], and where *A.* bought a stack of hay standing in *B.*'s yard, and afterwards sold a part of it to *C.* who took such part; this was held sufficient evidence of the delivery to *A.* to take the case out of the statute [2]. So where goods are ponderous, and not easily moved, the delivery of the key of a warehouse where they are will be sufficient [3]. And if a man, carrying on the distinct business of a livery stable keeper and dealer in horses, remove a horse which he has sold, to the stables kept for livery horses, on the purchaser desiring him to keep him at livery, this also has been deemed sufficient [4]. Again, where the goods are lying at a distant place in the custody of a third person, and the seller writes a note to such third person, desiring him to deliver them to the buyer, this also is sufficient evidence of a delivery to him to enable him to maintain an action against the seller, if he afterwards revoke that order [5]. It matters not how small the quantity delivered is, if it be considered by the parties as part of the thing sold. Thus, where sugars, while under lock in the king's warehouse, were advertised for sale, and after they were weighed a sample of half a pound weight was taken from each hogshead, which sample was produced at the sale, and delivered to and accepted by the purchaser, as part of his purchase, to make up the quantity marked as weighed at the king's beam, this also was held to be a sufficient delivery [6]. But to make a delivery of part of the goods within the act, it must appear that what was delivered was considered by the parties to be part of the thing sold; and therefore a delivery of a sample of corn, when it appeared that such sample was not considered as part of the corn sold,

[1] Simon *v.* Motivos, ubi supra.

[2] Chaplin *v.* Rogers, 1 East, 192. [217]

[3] 1 East, 194.

[4] Elmore *v.* Stone, 1 Taunt. 458.

[5] Searle *v.* Keeves, 2 Esp. N. P. Cas. 598.

[6] Hinde *v.* Whitehouse, 7 East, 558.

Part II. *Statute of Frauds.*

was held not to take the case out of the statute[1]. In all the above cases the purchaser had done some act manifesting his intention of accepting the thing sold; but where a sale of tares, part of the vendor's stock remaining at home, took place at a public market, which it was agreed should remain in the vendor's possession till called for, and the agent of the vendor in his return home measured out the quantity agreed for and put them apart for the purchaser, this was holden to be no delivery[2].

One other observation only remains to be made on this statute, and that is, as to what shall be deemed a sufficient note or memorandum in writing: As to this it has been held, that sales of *goods* at an auction are not within the statute, for that the entry of the buyer's name, &c. by the auctioneer[3], is a sufficient memorandum of the contract, and that he is the agent of both parties authorized to make it[4].

But in the case of a sale of *lands*[5] by auction, or otherwise, the contract is not binding, unless signed by the parties themselves, or their agents specially authorized for that purpose[6], which, it has been said, a mere auctioneer employed by the seller could not be; but in a subsequent case, Lord *Eldon* expressed a doubt on this point[7]; and the Court of Common Pleas, after time taken to consider of the question, held, that a person by bidding aloud constituted the auctioneer his agent, to write his name down as the purchaser, and thereby make a contract in his behalf; so that it is now settled that the agent need not be authorized in writing[8].

No particular form is required, it is sufficient that a note of the agreement is made in writing; and therefore if, on the treaty of marriage with the daughter of a man, he write a letter wherein he says he will give her such a sum of money as her portion[9]; or a mother, who has agreed to give a sum of money as a portion with her daughter, sign, *as a witness*,

[1] Cooper *v.* Elton, 7 T. Rep. 14.

[2] Howe *v.* Palmer, 3 B. & A. 321.

[3] Vide 7 East, 558.

[4] Simon *v.* Motivos, ubi supra.

[5] Stansfield *v.* Johnson, 1 Esp. Cas. 101.

[6] Walker *v.* Constable, 1 Bos. & Pul. 306. Buckmaster *v.* Harrop, 2 Ves. jun. 344.

[7] Coles *v.* Trecothick, 9 Ves. jun. 349.

[8] Emmerson *v.* Heelis, 2 Taunt. 38.

[218]

[9] Bird *v.* Blosse, 2 Vent. 361. Moore *v.* Hart, 1 Vern. 110.

ness, articles made with her approbation for settling it [1]; either of these acts is sufficient to bind them: and if the seller of goods above the value of 10*l.* deliver to the buyer a printed bill of parcels, "Mr. *A.* bought of *B.* &c." this is a sufficient signature by him, though he does not *write* his name [2].

But a memorandum made by the buyer's clerk in his book as follows, viz. "Bought of *W. P.* 20 puncheons of treacle, 37*s.* to be delivered by 10 Dec." and signed by the seller, is not sufficient to bind him, because it does not appear by the memorandum to whom the treacle was sold [3]; and for a like reason where a printed prospectus was delivered out for a set of prints descriptive of scenes in the plays of Shakespear, and a book was opened intituled "Shakespear's subscribers, their signatures [4]," in which the defendant signed his name, but which book did not refer to the prospectus, it was held the signature in the book was not sufficient to take the case out of the statute.

So the circumstance of the defendant writing a letter to the plaintiff, stating that the article sent was not worth above so much, and therefore returning it to him [5], does not amount either to a note in writing or an acceptance of the goods, so as to take the case out of the statute.

Another case also lately occurred, where the plaintiff's rider, calling on the defendant, entered in his order-book these words, viz. "19 Feb. 1811. Of John Smith, 64*l.* (alluding to money then paid by the defendant); Do. 40 of 3. 58/" which was explained to mean that the defendant had ordered forty sacks of flour, called thirds, at 58*s.* a sack. This was not signed by the defendant, though read to him by the rider, and therefore the contract was held to be void.

But in a subsequent case, where an attorney wrote a letter to another attorney in these terms, viz. "The

[1] Wellsford *v.* Beezley, 1 Wils. 118.

[2] Sanderson *v.* Jackson, 2 Bos. & Pul. 238. Schneider *v.* Norris, 2 M. & S. 286, S. P.

[3] Champion *v.* Plummer, 1 Bos. & Pul. N. Rep. 252.

[4] Boydell *v.* Drummond, 11 East, 142.

[5] Kent *v.* Huskinson, 3 Bos. & Pul. 233.

Cooper *v.* Smith, 15 East, 103.

Bateman *v.* Phillip, 15 East, 272.

Part II. *Statute of Frauds.*

bearer, *D. W.* has a sum of money to receive from a client of mine some day next week, and I trust you will give him indulgence till that day, when I undertake to see you paid;" was held to be sufficient, though it was objected on the behalf of the defendant, that neither the sum nor the person to whom due was mentioned; and that if parol evidence were admitted, the plaintiff's attorney might apply this letter to a debt due to himself, or any other person, from *D. W.* and to any amount.

It was a few years since determined, that in cases falling within the 4th section of this act, both the consideration and the promise must be set down in writing, and signed by the party to be charged therewith [1]. This doctrine was for some time much doubted by the profession, and the present Lord Chancellor expressed his dissent from it in two cases [2]; and in several other cases the judges have studiously avoided giving an opinion upon it: but three cases [3] have lately occurred in the Courts of Exchequer, King's Bench, and Common Pleas, in which the judges of those courts unanimously confirmed it. But in the case mentioned in the 17th clause, it is sufficient if the note signed by the person to be charged with it state the promise, the consideration need not be mentioned [4]. And in the other case it is not necessary that there should be an undertaking on the part of the seller to deliver the goods; therefore a paper in these words, "I guarantee the payment of any goods which *A.* shall deliver to *B.*" is sufficient [5].

[1] Wain *v.* Warlters, 5 East, 10.

[2] Ex parte Minet, 14 Ves. 190. Ex parte Gordam, 15 Ves. 286.

[3] Lion *v.* Lamb, Jenkins *v.* Reynolds, C. B. Trinity, 2 Geo. 4.

Fell. Law Merc. of Guar. 36.

[4] Egerton *v.* Matthews, 6 East, 307.

[5] Stadt *v.* Lill, 1 Camp. 242. 9 East, 348.

Evidence in Actions on Bills of Exchange and Promissory Notes.

On Bills of Exchange, &c.

ANOTHER contract, which, by the custom of merchants, and the recognition of it by our courts and the legislature, must be in writing, is that by bills of exchange and promissory notes.

It

It is not the intention of this work to enter into the whole law relating to these, or any other contracts. In its nature it is confined to the *proof* required in an action on them; but the legislature having imposed certain stamp duties upon them, the want of which renders them of no avail, it may be proper here to mention that in this case, as in the others, it is necessary to see that a proper stamp is impressed; one of the same, or greater value, but of another denomination, will not be sufficient[1]; but the legislature[2] has provided that, in such case, the commissioners of stamps may order a proper stamp to be impressed on payment of the duty, and 40*s.* in case the bill, &c. shall be produced to them before due; but if not produced till afterwards, then it may be stamped, on payment of the duty and 10*l.*

[1] Farr *v.* Price, 1 East, 55. (c).

[2] By stat. 37 Geo. 3, c. 136, s. 4 & 5.

In cases, however, where a bill or note is not properly stamped, the plaintiff may, if he has evidence of the consideration passing from him to the defendant, and counts in his declaration adapted to it, as in the case of goods sold, money lent, &c. give

Alves *v.* Hodgson, 7 T. Rep. 241. Tyte *v.* Jones, cited 1 East, 58, note.

(c) Several cases have lately occurred on this subject, some at *Nisi Prius*, where a question depending on several acts of parliament could not be very accurately considered; and others in Bank, where the different statutes have been referred to and discussed. I shall only refer to those of the latter description. In the case of *Farr* v. *Price*, 1 East, 55, cited above, the court held that a promissory note for 25*l.* 5*s.* written upon a 9*d.* stamp, (being the stamp imposed by 31 Geo. 3, c. 25, on notes not exceeding 50*l.*) instead of an 8*d.* stamp (being that required by stat. 37 Geo. 3, c. 90, on notes not exceeding 30*l.*) was void. But in *Taylor* v. *Hague*, 2 East, 414, it was determined that a promissory note for 45*l.* which by law required a stamp of 1*s.* 6*d.* composed of three different sums applicable to three different funds, under three acts of parliament, being written on a 2*s.* stamp, composed of three different sums applicable *to the same funds*, though in *larger* proportions to each than was required, such note was good. In the last case, the note was drawn since the 37 Geo. 3, but it has been very lately determined that a note drawn before that statute upon a *receipt stamp* of equal value, is not good. *Chamberlain* v. *Porter*, 1 Bos. & Pul. N. R. 30.

Note. By statute 44 Geo. 3, c. 98, all former stamp duties are repealed after 10th Oct. 1804, and new ones imposed, as was again done by 55 Geo. 3, c. 184.

Part II. *On Bills of Exchange, &c.*

evidence of that consideration, and recover on those counts; for though the instrument is void, the law implies a promise to pay the money due on the consideration.

[220]

The first and most simple case is that of an *action by the payee, against the maker of a note, or acceptor of a bill of exchange.* In this case the only proof necessary is, that the name subscribed to the note, or acceptance of the bill, is the hand-writing of the defendant, or that of some person specially authorized, or usually entrusted by him, to sign such instruments, or if in the case of a bill the acceptance were verbal, the circumstances under which it was made. By accepting the bill, with sight of it, the hand-writing of the drawer is admitted, and therefore need not be proved; but if the bill were never shown to the acceptor, the hand-writing of the drawer must be proved also. It was long considered as a general rule, subject to no exception, that it was not necessary to prove any presentment for payment, in an action against the maker of a note, or the acceptor of a bill. A practice, however, having been adopted of late years, of making notes payable at a particular place, and of accepting bills so payable; several cases came before the different courts, and not only were some nice distinctions taken, but a difference of opinion prevailed between the courts upon the subject. At length a case went by writ of error to the House of Lords, where it was solemnly decided, that if an acceptance be made on a bill payable at a particular place, the plaintiff in his declaration must aver, and of course prove on the trial, a presentment for payment at that place. The like evidence would be required in an action against the maker of a note payable at a particular place; though in some cases, prior to the above decision, a distinction had been taken between its being made

Wilkinson v. Lutwidge, Str. 648.

Rowe v. Young, D. P. 2 B. & B. 165.

so

so payable in the body of the note, or by a separate memorandum on another part of the paper, on which the note was written[1]. But though it is necessary in these cases to prove a presentment at the place appointed, yet it is not incumbent on the holder to prove that notice of the refusal was given to the acceptor whether the action be against him or against the endorser[2]; for the presentment at the place appointed is a presentment for the agent of the maker or acceptor who has appointed that place for payment, for whose default he must be answerable without further notice.

[1] Edwards v. Dick, 4 B. & A. 212.

[2] Smith v. Thatcher, Ib. 200. Treacher v. Hinton, Ib.

If the action be brought *by an endorsee*, it is also required to prove the hand-writing of the first endorser, and of the others likewise, if their endorsements are stated in the declaration; but if not so stated, the proof of the first endorsement only is necessary[3]. This evidence is sufficient in common cases; but where a bill or note has been stolen from the real owner, or given on a bad consideration, it will be incumbent on the holder to prove that he received it *bonâ fide* for a valuable consideration[4]; and this will now make the note good in his hands, though originally tainted with usury[5]. If founded on the consideration of money won at play, it still continues void against the maker or acceptor, though in the hands of an innocent endorsee[6]; but the payee or drawer to whom it was given for money won by him, and who endorses it to a third person for good consideration, cannot, on payment being refused by the maker or acceptor, make the original want of consideration a defence to the action against himself[7].

[3] Smith v. Chester, 1 T. Rep. 654.

[4] Peacock v. Rhodes, Doug. 611.

[5] Stat. 58 Geo. 3, c. 93.

[6] Bowyer v. Bampton, 2 Stra. 1155.

[7] Edwards v. Dick, 4 Barn. & Ald. 212.

In actions *against the endorser* his endorsement must be proved, and also that the bill was presented for payment or acceptance, and refused, and that due notice was given to the defendant of that fact; which may be done by proof that a letter containing such

Part II. *On Bills of Exchange, &c.*

such notice was put in the post-office, and directed to him [1]; but no evidence can be given of such letter, without notice to the defendant to produce it [2]. The hand-writing of the drawer, and all previous endorsers, being admitted by the defendant's endorsement, need not be proved [3].

The like evidence, and also the defendant's hand-writing, must be given in an action *against the drawer*.

In the case of foreign bills, the non-payment, &c. by the drawee can be proved by no other evidence than the protest [4]; which protest, if made in a foreign country, proves itself without further evidence [5].

If several partners draw a bill in the name of the firm upon one who is a member of it, no notice of the dishonour is necessary, for each must be presumed conusant of the acts of the other [6]; and in the common case of a bill drawn by *A.* on *B.* where the drawer said before the bill became due that it would not be paid, it was held to be unnecessary to give any notice to him of the subsequent dishonour [7]. So if the drawer have no effects in the hands of the drawee at the time, proof of this fact will excuse the want of notice to the drawer in the case of an inland bill, or of a protest in a foreign one [8]; though in an action against the endorser, who has no concern with the accounts between the drawer and acceptor, the regular evidence must be given [9]; but even here if the endorser expressly promise to pay it after its dishonour, this is sufficient to charge him, whether such promise be made to the plaintiff, or any other person at that time a holder of the bill [10].

When the *drawer* brings an action *against the acceptor* for not paying the bill to a third person [11], or his order, he must prove the acceptance, that the bill was presented for payment, dishonoured, and returned to him. The bare production of the bill with a receipt

[1] Sanderson v. Judge, 2 H. Bla. 509.
[2] Shaw v. Markham, Peak. N. P. 165. Langdon v. Hull, 5 Esp. Cas. 156.
[3] Lambert v. Pack, Salk. 127. Lord Raym. 443. Critchlow v. Parry, 2 Campb. 182.
[4] Gale v. Walsh, 5 T. Rep. 239.
[5] 12 Mod. 345. Ante, 71.
[6] Porthouse v. Parker, Camp. 82.
[7] Brett v. Levett, 13 East, 213.
[8] Bickerdike v. Bollman, 1 T. Rep. 409.
[9] Wilkes v. Jacks, Peake N. P. 202.
[10] Lundie v. Robertson, 7 East, 231. Potter v. Raworth, 13 East, 418.
[11] Simmonds v. Parminter, 1 Wils. 185.

a receipt endorsed on the back of it, will not be sufficient, for that is *prima facie* evidence of a payment by the acceptor[1].

[1] Scholey v. Walsby, Peak. N. P. 25.

Of the Evidence in Actions on Policies of Assurance.

ANOTHER simple contract, which is always reduced into writing, is a policy of assurance.

To support his action on this instrument the plaintiff must prove the defendant's subscription, and the interest of the plaintiff or other persons in whom the interest is stated to be. The interest in the ship may be proved by possession, or acts of ownership, without the production of the register[2]; and indeed the certificate of registry is no evidence of the plaintiff's interest without also proving possession[3]. Where the insurance is on goods, the interest in them has been generally considered as proved by production of all the usual documents, such as bills of parcels, costs of outfit, the bills of lading signed by the master, specifying the goods received on board, and for whom he is to carry them, custom-house clearances, and such other papers as may be thought necessary to substantiate his right to the property.

[222]

[2] Robertson and another v. French, 4 East, 130. Vide Park's Insurance, 406. Russel v. Boheme, 2 Stra. 1127.

[3] Pirie v. Anderson, 4 Taunt. 652.

The plaintiff must then prove that the ship sailed on her voyage; and, in case there be any warranty in the policy, that he has complied with it; that the loss happened by one of the perils mentioned in the policy, during the course of the voyage, and by the means stated in the declaration. In cases of capture, the proceedings in foreign courts are often necessary. Their effect we have before had occasion to consider[4].

[223]

[4] Ante, 69.

In losses happening by the perils of the seas, where every person perishes, it is impossible to prove the actual loss. In this case presumptive evidence is sufficient[5]; proof that the ship departed, and that, in

[5] Green v. Brown, 2 Stra. 1199. Newby v. Read, Park.

Part II. *Policies of Assurance.*

in the ordinary course of such a voyage, she would have arrived long since, is sufficient to raise a presumption that she perished at sea.

No precise time is fixed as evidence of a loss, and indeed it must, in every case, depend on the particular circumstances: but by the practice among underwriters a ship is considered as lost, if not heard of for six months together, on a voyage within any part of Europe; or twelve months, if bound to a greater distance.

Vide Park, 64.

Where the defendant adjusted an account of an average loss, and endorsed the policy thus, viz. "Agreed to pay 44*l.* 6*s.* 6*d.* for particular average on this policy, payable in one month," and the underwriters afterwards expressed doubts about the loss, Lord *Kenyon* held that it was incumbent on the plaintiff to prove that fact.

Garron *v.* Galbraith, Guildh. Sitting after T. 25 Geo. 3. MS.

The defendant on the general issue may avail himself of any circumstance which makes the policy void, as fraud or misrepresentation, want of interest, the ship not being sea-worthy, deviation, non-performance of warranties, &c. Proof of fraud, or want of sea-worthiness, lies upon the defendant; but in cases where such a defence is expected, it will, of course, be proper for the plaintiff to be prepared with evidence to support that part of his case.

[224]

This is the evidence ordinarily required to support an action on this instrument. The profession being already in possession of full instructions on this subject, in the books of Mr. Justice *Park* and Mr. Serjeant *Marshall*, it is quite unnecessary to notice in this place the various cases which may arise.

Of the Evidence in Actions between Vendors and Vendees of Lands or Goods.

Actions by Vendor.

The evidence in an action founded on an executory contract for the purchase of lands or goods, as far

far as it is affected by the statute of frauds, has been noticed in a former page; but it will not be improper to say something further as to the other evidence necessary to sustain an action on such a contract. The contract being established, the plaintiff must shew that he has done every thing in his power to carry it into execution. He must, in cases where he was the seller of lands, prove that he has delivered an abstract of his title to the defendant, and have the title deeds ready to produce, but he will not be called on to prove them [1]. He must then prove either that he has prepared and tendered a conveyance, properly executed, to the defendant, and offered to deliver it to him, on payment of the purchase-money; or else that he has tendered a draft of a conveyance, and that the defendant has absolutely refused to go on with his contract, and discharged the plaintiff from proceeding in it [2]. In the case of goods which are themselves the subject of delivery, and where by the terms of the contract they were to be delivered by the plaintiff, it must be proved that they were taken to the place of delivery at the appointed time, or else that the plaintiff being ready, and offering to deliver them, the defendant precluded the necessity of a formal tender by a refusal beforehand to complete his contract [3]. If they were to be fetched away by the defendant, it must be shown that the plaintiff was ready to have delivered them at the time, but that the defendant did not come or send for them.

Ante, 219.

[1] Thompson v. Miles, 1 Esp. 184.

[225]

[2] Goodison v. Nunn, 4 T. Rep. 761.

[3] Glazebrook v. Woodrow, 8 T. Rep. 366. Jones v. Berkley, Dougl. 687.

The defendant may avoid the contract by showing that the plaintiff was not able to fulfil it on his part, or was guilty of fraud in the making of it. If the defendant prove that the plaintiff has not a title, it is a sufficient answer to the action; and, in one case [4], where two different lots had been sold at an auction, which the purchaser bought for their contiguity to each

[4] Gibson v. Spurrier, Sittings after Mich. T. 36 Geo. 3. MS. Chambers v. Griffiths, 1 Esp. Cas. 150, S. P.

Part II. *Actions by Vendor.*

each other, and the vendor had not a good title to one of them, Lord *Kenyon* held this fact as sufficient reason for his rescinding his contract as to both; and whether the objection to the title be, that such title is insufficient at law, or that there are equitable claims which would prevent the vendee from safely holding the purchased premises, it is equally an answer to the action of the vendor, or the foundation of one at the suit of the purchaser; for the intention of the contract being, that the purchaser should have a good title to the premises purchased, neither a court of law nor of equity will compel him to take premises which may be immediately taken from him, or burthened with a charge which he did not contemplate or provide against. In one case [1], the Court of King's Bench said, that a court of law could not take notice of an equitable title; but in subsequent cases [2], where the point came directly before the court, it was holden that an equitable objection to the title was equally strong with one founded on a legal defect. In general the title ought to be complete at the time by which it was stipulated to be made, but in one case [3] where the defendant absolutely refused to receive any abstract, Lord *Kenyon* held it to be sufficient for the plaintiff to show a title at the time of the trial, though in fact it was not complete when he commenced his action. The employment of puffers by the seller [4], whereby the price was raised upon the *bonâ fide* bidder, there being but one person who really bid, has been held to furnish a defence to an action for not completing the contract. But in the Court of Chancery Lord *Alvanley*, when Master of the Rolls, held [5] that the circumstance of a person being employed to buy in the estate, if the biddings did not amount to a certain sum, and bidding accordingly, at a sale which was attended

[1] Alpass *v.* Watkins, 8 T. Rep. 516.

[2] Elliott *v.* Edwards, 3 Bos. & Pul. 181. Maberley *v.* Robins, 5 Taunt. 624.

[3] Thomson *v.* Miles, 1 Esp. Cas. 185.

[4] Howard *v.* Castle, 6 T. Rep. 642.

[226]

[5] Bramwell *v.* Alt, 3 Ves. jun. 620.

attended by several real and *bonâ fide* bidders, was not sufficient to enable the highest bidder to avoid his contract.

When the action is brought *by a purchaser*, he must show that he was ready to have accepted the thing purchased at the appointed time, and to have paid the stipulated price; to prove which, he must in general give evidence that he tendered the money, and in the case of a sale of lands, a conveyance, or draft of one, and demanded the execution of the conveyance, or delivery of the goods[1], or, if they were to be taken to a certain place by the seller, that he was at the appointed place ready to receive them, and prepared with his money to have paid for them on delivery[2]. But where the seller has refused to deliver the goods, the very fact of the buyer demanding them, will be evidence of his being prepared with the money[3]. And in the case of a sale of lands, where a deposit has been paid, and the seller refuses to deliver an abstract, or delivers one which shows he cannot make a good title, it is not necessary for the purchaser to prepare a conveyance; but in case he has done no act to affirm the contract, he may immediately bring an action for money had and received against the auctioneer for the money deposited[4]. If, however, he has taken possession of the premises, or made any alteration in them so as to alter the condition of the seller, he cannot maintain this action, but must bring a special action on the contract[5].

[1] Morton v. Lamb, 7 T. Rep. 125.

[2] Rawson v. Johnson, 1 East, 203.

[3] Wilkes v. Atkinson, 1 Marsh. 142.

[4] Seward v. Willock, 5 East, 202.

[5] Hunt v. Silk, 5 East, 449.

Contracts for the sale of goods are generally made on the expectation of a rise or fall in the price of fluctuating commodity, and the person whose speculation has failed, frequently breaks his contract. In these cases, therefore, it will also be important to prove the difference of price at the times of the making and of the breach of the contract, in order to ascertain

Part II. *Action by Vendee.*

ascertain the damages which the plaintiff has sustained (*d*).

The case of *Peeram* v. *Palmer*, reported at length in *Gilb. L. E.* 194, and not noticed, as far as I can find, in any other book, contains an important decision as to the effect of a dispensation by one party with an exact performance by the other, in contracts of this nature. The plaintiff bought of the defendant 100 quarters of barley, to be delivered to the plaintiff at *Hoddesdon*, between harvest and Candlemas, at the rate of 16*s.* per quarter, to be paid at the times of delivery, according to the quantity delivered at each time. The defendant, on the day but one before Candlemas, delivered to the plaintiff's use, at the place appointed, a quantity of barley, which was sent for twenty quarters, but when the same was mea-

[227] Peeram *v.* Palmer, Gilb. L. E. 194.

[228]

(*d*) It must here be recollected, that I have taken the cases of an agreement where the purchase is to be completed, and the money paid at the *same time*; and therefore, before this is applied to any particular case, it must be well considered, whether, by the terms of the contract, the act of one party is a condition precedent to the act of the other, or whether they are independent. "Whether one promise be the consideration of another, or whether the *performance*, and not the mere promise, be the consideration, must (as was observed by Mr. J. *Lawrence*, in *Glazebrook* v. *Woodrow*, 8 T. Rep. 373,) be gathered from and depend entirely upon the words and nature of the agreement;" but, (as was observed by Mr. J. *Le Blanc* in the same case,) "No person shall call upon another to perform his part of a contract until he himself has performed all that he has stipulated to do as the consideration of the other's promise. This applies to every case of a sale of property, where one engages to *convey on a certain day*, and the other to pay *at the same time*; and this whether the one be stated in terms to be in consideration of the other or not. In neither case will the court compel one party to perform his part until the other has done, or has offered to do his own." For the many nice distinctions which have been taken in these cases, see *Williams's Saunders*, 320, note (4,) where all the cases as to this point are collected, except those before mentioned of *Glazebrook* v. *Woodrow*, and *Rawson* v. *Johnson*, 1 East, 203, which have been determined since the publication of that note. In the last case the court said, that when the seller absolutely refused to deliver the goods sold, there was no necessity for the purchaser to make a formal tender of the money.

sured,

Action by Vendee.

sured, it was found to be but nineteen quarters and a half. The barley being short of measure, the plaintiff paid to the defendant's servant 10*l.* and no more, though he had enough by him in the house to have paid for the whole 100 quarters, and before he brought the action he paid the other 6*l.* to the defendant. The case, having been reserved for the opinion of Lord C. J. *Parker*, appears to have been argued at considerable length, and the principal point which was made in argument was, that these were mutual and independent promises. On this point, however, no opinion appears to have been given; but the Chief Justice held, that the defendant, having delivered nineteen quarters and a half without ready money, had dispensed with the condition as to that quantity, though he might have chosen whether he would have delivered it until he was paid, and then there was no reason but that he should not go on with the delivery of the residue according to his contract. But where, in an action for the not delivering of wood, it appeared that the wood had been sold to be paid for on delivery by a bill at two months; and that the defendant had permitted the plaintiff to carry part away without receiving any bill; Lord *Ellenborough* held, that this was only a dispensation *pro tanto*, and that the vendor was at any time entitled to stand on his rights as they were originally established by the contract of sale.

Payne *v.* Shadbolt, 1 Campb. 427.

Action on a Warranty.

On a Warranty.

In an action on a warranty, the plaintiff must prove the sale and warranty. In general any representation made by the defendant of the state of the thing sold, at the time of the sale, will amount in law to a warranty; but where the defendant refers to any document, or to his belief only, in such case

[229]

Part II. *Action by Vendee.*

no action is maintainable, without proof that he knew he was representing a falsehood. Thus, where a man sold a horse, which he stated to be of a certain age, according to a pedigree delivered to him when he purchased the horse, and showed the pedigree to the buyer [1], Lord *Kenyon* held, that no action could be maintained against him, without proving that he knew the pedigree to be false: and in like manner, a representation that a picture is the production of an ancient master, long since deceased, does not bind the party to a warranty that it is so; but is only a representation of the fact, according to the best of his belief; and therefore no action can be maintained, unless it be proved that the defendant in this case also knew, or had reason to believe, that he was representing a falsehood [2]. In these cases there was no breach of that good faith which the law expects in all contracts between man and man: but where a person knowing of defects in a ship, which it was impossible for the buyer to discover, did not disclose them to him at the time of sale, Lord *Kenyon* held that he was liable to an action [3], as on a warranty that the ship was free from all latent and concealed defects, although, by the express terms of the contract, the buyer was to take her with all faults. In subsequent cases [4], however, this decision has been overruled, and it has been holden, that the seller is not answerable unless he has taken some means to conceal the defects.

When the unsoundness is proved, it is proper to show an application to the vendor to take back the thing sold, and return the money, otherwise the plaintiff will not be entitled to recover for the keep [5]; but this is not necessary to maintain the action, for the buyer may affirm the contract, and sue for damages occasioned by the breach of it, so that where the buyer of an unsound horse kept him [6] and endeavoured

[1] Dunlop *v.* Waugh, Peake's N. P. Cas. 123.

[2] Jewdwine *v.* Slade, K. B. Sittings at Westm. after Tr. T. 37 Geo. 3. MS. Esp. Cas. 572. S. C.

[3] Mellish *v.* Motteux, Peake's Cas. 115.

[4] Baglehole *v.* Waters, 3 Campb. 154. Pickering *v.* Dawson, 4 Taunt. 779. [230] Scheider *v.* Heath, 3 Campb. 506.

[5] Caswell *v.* Coare, 2 Campb. 82.

[6] Filder *v.* Starkin, 1 H. Black. 17.

endeavoured to sell him, it was held that the action on the warranty was still maintainable.

If the buyer had the liberty of returning the thing bought, in case he disliked it, within a certain time, and did so accordingly; or if the defendant, on the horse being discovered to be unsound, consented to accept him back, and he was returned; the proof of these circumstances gives the plaintiff a right to recover back the whole money, as money had and received to his use. But the mere circumstance of the vendor, who had sold a horse as a sound one, saying, in a subsequent conversation with the buyer, that if the horse were unsound he would take it again and return the money, (he at the same time insisting that the horse was sound,) will not enable the buyer to recover in an action for money had and received, because the original contract still remains open, and the breach of that contract the only cause of action.

Towers v. Barret, 1 T. Rep. 133.

Payne v. Whale, 7 East, 274.

Of the Evidence in Actions between the Vendor and Vendee of Stock, or by the Lender against the Borrower thereof.

Vendor of Stock.

THE great quantity of property which is invested in the public funds has of late years given rise to a species of action unknown in earlier times, viz. that on a contract either to *transfer* or to *replace* stock at some future day; and as these contracts are most commonly reduced into writing they will properly form a part of this section.

When an action is brought by the *seller* against the *purchaser* for not *accepting* stock, the first fact to be proved is, that the plaintiff was actually possessed of stock to the amount for which he contracted (*e*). He

[231]
Vide stat. 7 Geo. 2, c. 8.

(*e*) This fact, and all others which have reference to the books of the Bank, must be proved by examined copies from the Bank books

Part II. *Vendor of Stock.*

He must then prove the contract, and next, either that he made an actual transfer of the stock, or else that he attended at the Bank for the purpose of transferring it, till the books shut, on the day whereon it was to be transferred. In the latter case he must also prove, that he afterwards sold and actually transferred the stock to some third person, which should be done as soon as possible [1]. In a late case [2], which arose on this subject, the judges of the Court of King's Bench expressed considerable doubt, whether the transfer to the third person should not be made at the next transfer day after the contract was broken; but the majority of the court inclined to think that it was sufficient if made within a reasonable distance of time afterwards, and that in case the stock had borne a higher price in the intermediate time, the defendant should have the benefit of that circumstance by making that higher price the measure of the damages.

[1] Bordenave v. Gregory, 5 East, 107. Heckscher v. Gregory, 4 East, 607.

[2] Bordenave v. Gregory, ubi sup.

[232]

In case the action is brought by the *purchaser*, he also must prove that the seller was possessed of the stock at the time of the contract; that he tendered the money and requested a transfer, which the other refused; or that he attended at the Bank to accept the transfer, and was prepared with money to pay for it, which could be inferred from a demand and refusal; and lastly, that he actually bought and duly accepted the same quantity of stock of another person at a greater price.

Vide Calconel v. Briggs, Salk. 113, and the above cases.

Vide Wilkes v. Atkinson, ante, 239. 7 Geo. 2, c. 7, 8.

In the second kind of action, viz. that for not *replacing* stock, the plaintiff must first prove that being possessed of the stock in question, he sold it out at the time mentioned in the declaration, and

books (vidé *ante*, 89, and *Marsh* v. *Colnet*, 2 Esp. 665,) to obtain which a *subpœna duces tecum* should be served on one of the clerks at the office where the books are kept, and application made to the Bank solicitor, who will represent to the Bank the propriety of the clerk's attending with a copy from the book.

advanced

advanced the produce to the defendant, on his promise to replace it. He must then prove, by some person conversant with the funds, the current price of stock at the day on which it ought to have been replaced; and if it has risen since that time, and there has been no offer on the part of the defendant to replace it, he should also prove the price it has since borne; for, as the contract was specifically to replace the stock, and the plaintiff might, in case the contract had not been broken, have sold out the stock at any time afterwards, he is, according to one case [1], entitled to receive in damages the highest price at which he might have sold it, had the defendant performed his contract. But in another case [2], where it appeared from the plaintiff's letters, that he wanted a repayment in money and not in stock, the court held that he could only recover the price at the day when it ought to be replaced, or at the day of trial (at his option) without considering whether any higher price might have been obtained at any intermediate day.

Ch. II. s. 1. *Vendor of Stock.*

[1] Shepherd v. Johnson, 2 East, 211.

[2] M'Arthur v. Lord Seaforth, 2 Taunt. 257.

SECTION II.

Of the Evidence on parol and implied Promises. [233]

THE several instances which have been noticed were cases of *actual* and *express* promises; but the far greater number of actions of *assumpsit* are founded on promises *implied* by operation of law. This implication may arise either from the common and universal practice of mankind, or the usage of particular trades. If I order goods of a man, or employ him to do work, and no mention is made of the sum which is to be paid, the law implies a promise to pay the value of the goods, or as much as he deserves for the work: and in an action for it, the plaintiff must prove the delivery of the goods, or

Goods sold and delivered, &c.

Part II.
Quantum meruit.

performance of the work, and the usual prices charged for them; but it must appear that these *usual* prices are also a reasonable compensation for the trouble which the plaintiff has had, and therefore the charges of 5 *l.* per cent. by a surveyor[1]; or 7½ *l.* per cent. by an auctioneer[2] on a large building or sale; though proved to be *usual*, have not been allowed.

[1] Upsdel *v.* Stuart, Peake's Cas. 193.

[2] Maltby *v.* Christie, 1 Esp. Cas. 340. Sed vide post, [248,] note.

It will be proper here to observe, that the question of value can never arise where a certain sum is agreed upon, unless it be apparent that a gross fraud has been committed, as was the case where a man agreed to give a farthing a nail for a horse, doubling it each time[3], which would have amounted to an immense sum of money, and such as no man, who could have calculated the amount, would have agreed to give. But where a certain sum of money has been agreed to be given for any work of art (a portrait for instance) which is not properly executed, the defendant should return it, and will not be permitted to retain it, and enter into the comparative value[4].

[3] Vide 1 Vent. 267. Bul. N.P. 156.

[4] Grimaldi *v.* White, 4 Esp. Cas. 95.

[234]

Delivery to a Carrier or other Agent.

In order to show a delivery of goods, the plaintiff must either prove that they were delivered at the defendant's house, or to some person authorized by him to receive them; as if he name a particular carrier, or desire them to be sent by land carriage, and there is but one carrier to the place where he resides; the delivery to the carrier is a complete delivery to the purchaser, and he is answerable for them whether they ever arrive or not[5]. From these cases it would seem, that unless the purchaser point out a particular mode of conveyance, the seller sends them at his own risk, and that before he can charge the purchaser with the value of them, he must prove not only the delivery of them to the carrier, but also call some servant of the carrier to prove that he delivered them to the defendant. But in a late case[6], the

[5] Veale *v.* Bayle, Cowp. 294. Bul. N. P. 36. Haynes *v.* Wood, Ib.

[6] Dutton *v.* Solomonson, 3 Bos. & Pul. 582.

the Court of Common Pleas held, that delivery of the goods by the vendor to a carrier, not named by the vendee to be taken to him, was a delivery to the vendee, and he was chargeable. Lord *Alvanley*, delivering the opinion of the court, said, "it appeared to him to be a proposition as well settled as any in the law, that if a tradesman order goods to be sent by a carrier, though he does not name any particular carrier, the moment the goods are delivered to the carrier, it operates as a delivery to the purchaser; the whole property immediately vests in him; he alone can bring an action for any injury done to the goods; and if any accident happen to the goods, it is at his risk." The same doctrine is laid down in a former case at *Nisi Prius*[1]; we may therefore consider it to be now settled, that by a general order to send the goods by a carrier, the vendee adopts as his agent any carrier who may be appointed by the vendor (*f*).

[1] Vide 3 P. Will. 186; and King *v.* Meredith, 2 Camp. 639. Cooke *v.* Ludlow, 2 N. Rep. 119.

Proof of the delivery of meat, or other things commonly used in a family, at a man's house, is *prima facie* evidence that he ordered them on credit, and the law implies a promise to pay the value; which being proved, the plaintiff is entitled to a verdict for so much. If it be proved that the defendant's wife, or his servant, ordered them, the case is carried a step further, and the presumption is stronger, that they had his authority so to do[2]; and

[2] Manby *v.* Scot, 1 Sid. 109. Gilb. L. E. 183.

(*f*) In *Anderson v. Hodgson*, 5 Price, 650, the Court of Exchequer held, that an order by the defendant to send goods to a certain quay, to be left there till called for, without showing an acceptance of the goods by the vendee after their arrival at the quay, did not support an action for goods sold and delivered, where the goods had been delivered at another quay for the purpose of being forwarded by a vessel passing between the two, although they had afterwards arrived at the quay named by the vendee; and *Garrow*, B. observed, that "if Lord Alvanley could be supposed to have determined that a delivery generally to a common carrier, would have been sufficient to sustain the action, he should dissent from that opinion."

Part II. *Contract by Agent, Wife, &c.*

if it be also proved, that he has been accustomed to pay for goods so ordered, it is conclusive against him, and nothing short of payment to the creditor will discharge him from the action [1]. But the two first cases, resting only on presumption, may be destroyed by evidence, which shows that the defendant never entrusted his wife or servant to buy on credit, and that it was known to the plaintiff; for if the defendant prove that he gave them money to pay for the articles as they bought them, or that during a temporary absence, he made an allowance to the wife for the supply of necessaries for herself and family [2], and that the plaintiff knew of or was acquainted with the fact, or that his usual custom was to pay the plaintiff weekly [3], this shows that he never did authorize them to contract for him, and he is not bound by their contract. The case of clothes furnished to a married woman is similar in its nature, if suitable to the husband's station in life, the presumption is that he authorized his wife to buy them; but if it should appear that he gave her money to pay for them, or desired the plaintiff, or his servant, not to trust her, or if from other circumstances it appears that the tradesmen gave credit to the wife and not to the husband [4], the husband will not be liable [5].

[235]

[1] Vide Stubbing *v.* Heintz, Peake's Cas. 47.

[2] Holt *v.* Brien, 4 M. & S. 252.

[3] Vide Stubbing *v.* Heintz, Peake's Cas. 47.

[4] Bentley *v.* Griffin, 5 Taunt. 356.

[5] Etherington *v.* Parrot, 1 Salk. 118.

In cases where the husband and wife are parted, the law proceeds on a different principle: it does not there look to the *will*, but to the *duty* of the husband: if he turn his wife out of his house, or behave so cruelly to her, that she cannot with safety remain in it, he is liable for articles of provision and dress, suitable to his station, furnished to her by a third person, though against his express direction; for the law will not permit her to starve: and proof of the articles having been delivered, and that the defendant is her husband, is sufficient for the plaintiff to charge him [6]. To discharge himself from the action,

[236]

[6] Boulton *v.* Prentice, 2 Stra. 1214.

action, it is incumbent on the husband to prove that the wife has forfeited her claim to his protection, by living in a state of adultery at the time the goods were furnished, (for the mere circumstance of her having formerly committed adultery will not be a defence, if the husband afterwards received her back, and turned her out a second time[1];) or that she left his house against his consent, and without reasonable cause[2]; or refuses to return; and in the latter case it should also be proved, that either a general notice was published by the husband to all persons not to trust his wife, or a particular notice given to the plaintiff[3].

[1] Harris *v.* Morris, 4 Esp. Cas. 41.

[2] Manwaring *v.* Sands, 2 Stra. 706.

[3] Vide 1 Ld. Raym. 444.

If the husband and wife are parted by mutual consent, and she has a separate maintenance allowed by him, he will not be liable even for necessaries found her; and the general and public notoriety of their being so parted is sufficient, without proof of particular notice to the plaintiff[4].

[4] Todd *v.* Stokes, Salk. 16. Vide Bull. N. P. 135.

In the case of persons of an inferior station in life, the earnings of the wife have been held equivalent to an allowance by the husband[5]: but where the wife of a gentleman of rank and fortune was parted from him without any allowance by him, though she had a pension of 300*l.* a year, during the pleasure of the crown, the husband was held liable to her contract for necessaries[6](g).

[5] Warr *v.* Huntley, Salk. 118. N. P. 135.

[237]

[6] Thompson *v.* Harvey, 4 Burr. 2177.

Action for Money paid to the Defendant's Use; for Money lent; and on an Account stated.

Money paid.

To support the action for *money paid* to the defendant's use, the plaintiff must prove either that he has paid such money at the *request* of the defendant,

(g) The numerous cases which have arisen on this subject are collected together in Mr. *Nolan's* edition of *Strange*, 1214, note (1.)

or

Part II. *Money paid.*

or else that he has been *compelled* to pay it, in consequence of his misconduct, or of an engagement which the plaintiff had entered into on his behalf, or in a case where they were jointly liable, and where the defendant ought to have paid his proportion; for no man can of his own act make another his debtor against his will (*h*).

Stokes *v.* Lewis, 1 T. Rep. 20. Child *v.* Morley, 8 T. Rep. 610.

In the second of these cases, as where the goods of *A.* a lodger in the house of *B.* are distrained by the landlord, and *A.* brings an action against *B.* to recover the money which he has been obliged to pay to redeem his goods, he must prove that the money was due, and a distress made, and that he gave notice to *B.* of it, and requested him to pay the money, or indemnify him in replevying the goods, and that on such refusal he paid it himself (*i*).

Moore *v.* Pyrke, 11 East, 52.

And here it should be observed, that an actual payment must be proved to maintain this action; for, if instead of paying the money, *A.* were to permit the landlord to sell his goods, a special action on the case would be his only remedy; for immediately on the sale, the money paid by the purchaser

(*h*) In general one partner cannot maintain an action at law against another for the non-performance of any duty owing from him as partner, unless on an express covenant or stipulation; but where *A.* agreed with *B.* to take one half share of certain goods bought by *B.* and to bear half of any loss that might arise on them, or have half the profit that might be made, and to furnish *B.* with half the amount of the purchase-money in time for payment, it was holden that an action for money paid to the use of *A.* lay against him for his moiety of the price, for that was to be furnished by him in the first instance, although there might be an account to be taken between them as partners upon the subsequent disposal of the stock. *Venning* v. *Leckie*, 13 East, 7.

(*i*) *Exall* v. *Partridge*, 8 T. Rep. 308. In this case it was held, that if a lease be made to *A. B.* and *C.* and *B.* and *C.* assign to *A.* who occupies the premises, and goods are bailed to him by *D.* which are distrained by the landlord for rent due from *A. B. C.* they are all liable to an action at the suit of *D.* though he knew of the assignment.

vests

costs in the landlord in satisfaction of the rent, and ever is the money of the person whose goods are istrained; and in like manner, where the surety as the old security cancelled, and gives a new one, his form of action has been considered as equally supportable [1]. So where an auctioneer having been nployed to sell an estate, the seller's title to which as defective, the purchaser brought an action ainst the auctioneer to recover back the deposit ney, and the seller refusing on notice to defend the ion, the auctioneer paid the deposit, and also the costs of the action and his own attorney's costs, and then brought an action against the seller for money paid to his use. Lord *Ellenborough* held, that he could only recover the deposit in this form of action, a special count being necessary to recover the costs [2].

[1] Taylor v. Higgins, 3 East, 169. Maxwell v. Jameson, 2 B. & A. 52.

[2] Spurrier v. Elderton, 5 Esp. Cas. 1.

If the payment were made in consequence of a bond, wherein the plaintiff became bound as surety for the defendant, the first proof will be the due execution of the bond by them both; then, that the plaintiff was called upon to pay the money, and gave notice thereof to the defendant before he paid it. To prove the payment of the money in these cases, [238] the person who made it, or he by whom it was received, should be called as a witness, for the receipt or acknowledgment of that person will be no evidence against the defendant; and if levied under an execution, a copy of the writ should be proved. In case there are two sureties, each must bring a separate action for the money which he personally paid [3]; and where several persons become sureties for a third, and one has been obliged to pay the whole debt, he may, by separate actions against each of the others, compel them to contribute their respective proportions towards his loss [4]. In this case the obligation of the plaintiff, the defendant, and the other sureties must be proved, the application to them, and

[3] Beard v. Boulcot, 3 Bos. & Pul. 235.

[4] Cowel v. Edwards, 2 Bos. & Pul. 268.

Part II. *Money paid.*

and the payment by the plaintiff. It was in one case held, that where a bill of exchange had been drawn by one of three partners, in the name of himself and the others, after the dissolution of the partnership, in favour of a person who did not know of such dissolution, and the other two partners had thereby been obliged to pay the money, that they might *join* in an action to recover it[1]; but this case was decided under very particular circumstances; viz. it clearly appearing that the plaintiffs had *jointly* borrowed the money, and had given a *joint* note for part of it, and on that ground only the joint action was maintained.

[1] Osborne *v.* Harper, 5 East, 225.

[239]

In the cases which have been just mentioned, the law *implies* a promise of indemnity, and such promise arises in every case where they are jointly liable to a third person upon their joint *contract*. But in cases where two are jointly sued in *tort*, or trespass, and the whole damages are levied upon one, the law does not raise any such promise[2]. To recover a contribution or indemnity, therefore, in a case of this sort, the plaintiff must prove an *express* promise on the part of the defendant; and it has been held that such express promise will support the action, even in a case where neither the plaintiff nor defendant were liable to pay the money; for where two persons were jointly engaged in an illegal stock-jobbing transaction, and one, by the express authority and direction of the other, paid the whole loss, it was held that he might recover a moiety of it from the other[3].

[2] Merryweather *v.* Nixon, 8 T. Rep. 186. Farebrother *v.* Ansley, 1 Campb. 343. Wilson *v.* Milner, 2 Campb. 452.

[3] Petrie *v.* Hannay, 3 T. Rep. 418. Sed vide Aubert *v.* Mace, 2 B. & P. 371. Steers *v.* Lashley, 6 T. Rep. 61. Brown *v.* Turner, 7 T. Rep. 730; and Cannon *v.* Brice, 3 Barn. & Ald. 179; in which this case was expressly over-ruled.

Action for Money lent.

To support the action for *money lent*, the plaintiff must prove that money was lent by him to the defendant, either by calling some person who was present, or by proving the defendant's acknowledgment, which it has been held a promissory note amounts to, and is therefore evidence on this count[4].

[4] Vide Story *v.* Atkins, 2 Stra. 719; B. N. P. 137; and Harris *v.* Huntbach, 1 Burr. 378.

But

But the bare circumstance of the plaintiff having drawn a check on his banker, and of the defendant having received the money, is not sufficient evidence, without also showing some money transactions between them, from whence a loan might be inferred, for *prima facie* the check imports a payment, and not a loan[1].

[240]

[1] Cary *v.* Garrish, 4 Esp. Cas. 9. Aubert *v.* Walsh, 4 Taunt. 293.

Account stated.

The action on an *account stated*, must be supported by evidence of a settlement of accounts between the defendant and the plaintiff, or some person on his behalf. And though the reckoning be only of what is due to the plaintiff, without any counter demand by the defendant, it is sufficient to sustain the count, as where the defendant and the plaintiff's wife reckoned that the defendant had borrowed at one time 40*s.* at another 40*s.* and at another 4*l.* making together 8*l.* it was objected, that this being a reckoning on one side only, without deduction or payment on the other, did not support the count; but this objection was over-ruled[2]. So where the defendant admitted that he had bought standing trees of the plaintiff for a certain sum of money; and that he had cut them down and carried them away; this also was holden sufficient[3]. If two persons are in partnership, and covenant to account with each other, though no action of *assumpsit* will lie on these articles, till an account has been settled and liquidated, yet after such an account has been taken, and the balance struck, *assumpsit* will lie, as on an account stated[4]; and where there being accounts between *A.* and *B.*, *C.* became a partner with *B.* and dealings continued between *B.* and *C.* as partners, and *A.* who afterwards settled an account with *B.* and *C.* wherein was included the money due from *A.* to *B.* alone[5], Lord *Kenyon* held that the whole might be given in evidence under a count on an *account stated*, in an action by *B.* and *C.* But money

[2] Stuart *v.* Rowland, 1 Show. 215.

[3] Knowles *v.* Michel, 13 East, 249.

[4] Foster *v.* Allison, 2 T. Rep. 479; and Moravia *v.* Levy, Ibid. 483.

[5] Moore and another *v.* Hill, [241] Sitt. Guildh. after East. 1795, MS.

Part II. *Action for Money lent.*

money due from an executor, or from the defendant's wife whilst sole, cannot be blended with an account of the defendant as an individual, so as to make him generally liable, though in fact included in the same account.

See cases cited 2 T. Rep. 480.

Action for Use and Occupation.

Action for Use and Occupation.

ANOTHER action, which generally arises on a parol or implied promise, is the action for *use and occupation*, which is given by the statute 11 Geo. 2, c. 19, s. 14, by which it is enacted, that "where the agreement is not by deed, the landlord may recover a reasonable satisfaction for the lands, &c. occupied by the defendant, in an action on the case for the use and occupation of what was so held and enjoyed; and if it shall appear that there was a parol demise, or an agreement (not being by deed) whereon a certain rent was reserved, the plaintiff shall not therefore be nonsuited, but shall make use thereof as evidence of the quantum of the damages to be recovered." And by the same act, sect. 15, "if a tenant for life die before or on the day on which any rent was made payable upon any lease which determined on the death of such tenant for life, his executors may, in an action on the case, recover the whole, or a proportion of such rent, according to the time such tenant for life lived of the last year, or quarter of a year, in which the said rent was growing due."

[242]

Bannister *v.* Usborne, K.B. Sitt. after Hil. T. 36 Geo. 3. Elliot *v.* Rogers, 4 Esp. 59, S. P.

Since the statute, this is become the common form of action in all cases where the demise is not by deed, and even where there is an agreement under seal for a future lease, if such agreement do not contain words of present demise, or a covenant to pay rent, it may be used as evidence in this form of action.

To

To support the action, the plaintiff must show that the defendant occupied under his permission, or that of some person through whom he claims, for a mere stranger cannot try his title in this form of action[1]. He must therefore prove either an actual demise, the payment of former rent, either in the usual course, (in which case it will be proper to give the defendant notice to produce the receipts), or under a distress made by the plaintiff (in which case the notice of distress should be proved[2]); or, as in the case above-mentioned, a permission to enter and hold until a formal lease or future conveyance should be executed. If it be proved that the defendant entered by permission of the plaintiff, and then that he demised to another, who occupied, this will be evidence of an occupation by him, and the rent may be recovered from him in this form of action[3]; but the person who comes into possession will not be liable in this action for the antecedent occupation of the person from whom he received the premises; and therefore where assignees of a bankrupt took possession in the middle of the year, of premises occupied by him, and continued for some time in possession, it was held that they could only be charged for that portion of time during which they themselves had occupied[4](*k*). If the owner of an estate let

[1] Morgan v. Ambrose, cor. Wilmot, J. Monmo. Sum. Ass. 1756, MS.

[2] Panton v. Jones, 3 Campb. 372.

[3] Ball v. Sibbs, 8 T. Rep. 327.

[4] Naish v. Tatlock, 2 H. Black. 319.

(*k*) The bankrupt in this case would, before the late act of parliament, have been liable to an action of *assumpsit* for the whole rent, for his contract, being to pay during the tenancy, is executory and not discharged by the certificate. *Boot* v. *Wilson and another*, 8 East, 311. So he would also have been liable to an action of *covenant* on a lease, notwithstanding his certificate. *Mills* v. *Auriol*, 1 H. Black. 433; 4 T. Rep. 24. But *debt* would not lie against the original lessee for rent accruing after his bankruptcy, and after the assignee took possession under the commissioner's assignment. *Wadham* v. *Marlow*, 8 East, 314, note. Now, however, it is provided, that where a commission of bankrupt shall be sued forth against any person who shall be entitled to any lease, or agreement for a lease, and the assignee shall accept the same, and the benefit therefrom as part of the bankrupt's estate and effects, the bankrupt

Part II.
Action for Use and Occupation.

let it to a tenant from year to year, and then grant an annuity chargeable upon it, and the grantee afterwards bring an ejectment, and recover judgment; he may then maintain this action against the tenant, and recover all rent remaining in his hands previous to the day of the demise in the ejectment, for the tenant virtually held under him; but he cannot recover for any rent due subsequent to the day of the demise, for he is not permitted to act so inconsistently as to treat the lessee as a tenant and trespasser during the same period of time.

Birch v. Wright, 1 T. Rep. 378.

[243]

In proof of the occupation, it should appear that such occupation has been, as far as depended on the plaintiff, beneficial to the defendant. Therefore where the plaintiff, representing himself to have a longer term than he really had, agreed with the defendant to assign such term to him, and the defendant thereupon took possession, which possession was injurious rather than beneficial to him, by reason of the plaintiff having a shorter term in the premises; Lord *Kenyon* held the seller could not, on the purchaser rescinding the contract, and delivering back the premises, maintain this action for

Hanson v. Tomlin, Peake's Cas. 193.

rupt shall not be, or be deemed to be liable to pay the rent accruing, due after such acceptance of the same as aforesaid; and after such acceptance the bankrupt shall not be liable to the conditions, covenants, or agreements therein contained; provided that in all such cases it shall be lawful for the lessor, or person agreeing to make such lease, his heirs, executors, administrators or assigns, if the assignees shall decline, upon their being required so to do, to determine whether they will or will not so accept such lease or agreement for a lease, to apply by petition to the Lord Chancellor, Lord Keeper or Lords Commissioners of the Great Seal, praying that they may either so accept the same, or deliver up the lease or agreement for the lease, and the possession of the premises demised, or intended to be demised, who shall thereupon make such order as in all the circumstances of the case shall seem meet and just, and which shall be binding on all parties. Stat. 49 Geo. 3, c. 121, s. 19. On this statute it has been holden, that if the assignee of a lease become bankrupt, and his assignees refuse to accept the lease, the bankrupt still remains liable on his privity of estate. *Copeland* v. *Stephens*, 1 B. & A. 593.

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the time he was in possession. Indeed in one case [1], the Court of Common Pleas seems to have been of opinion, that in no case where a purchase went off on account of a defect of title, could the seller maintain this species of action for the use which the defendant had of the premises during the time he was in possession. They did not however decide the case on that ground, but proceeded on the idea of the interest of the money which the purchaser had paid, being a sufficient compensation for the use which he had of the premises. But in a subsequent case [2], the Court of Exchequer held, that the vendor might, where the contract had gone off without fault on his part, and the occupation had been beneficial to the purchaser, maintain an action for use and occupation; observing, that title was not necessary to support it, the declaration only alleging an occupation by the permission of the plaintiff; and such also appears at first to have been the opinion of *Mansfield*, Ch. Justice, in *Kirtland* v. *Pounsett*.

[1] Kirtland *v.* Pounsett, 2 Taunt. 145.

[2] Hall *v.* Vaughan, 6 Price, 169.

If the agreement be in writing [3], it must be produced, the plaintiff cannot, in such a case, go upon the bare occupation, for where there is an actual contract none can be *implied*. It is true that in an ejectment [4], where the plaintiff's witness having proved payment of rent, said, on cross-examination, that an agreement in writing relative to the lands in question [5], had been produced on a former trial between the parties, but he did not know the contents of it, and another witness proved that he had seen such agreement in the hands of the plaintiff's attorney that morning; yet, as no notice had been given by the defendant to produce this agreement, the court held this general evidence not sufficient to exclude the parol evidence of payment of rent, or to rebut the inference of a tenancy from year to year arising from it; but this case would hardly apply to the action for

[3] Brewer *v.* Palmer, 4 Esp. 213.

[4] Vide Doe dem. Wood *v.* Morris, 12 East, 237.

[5] Law *v.* Wills, Peake's Cas. 128, acc.

Part II. *What Instrument is deemed an Agreement and what a Lease.*

use and occupation, where the exact rent must be proved.

If the written contract amount to a present demise, an *agreement* stamp is not sufficient, but a *lease* stamp should be impressed [1]; and therefore questions frequently arise upon the construction of agreements between landlord and tenant, whether they are to be considered as agreements only for a future lease, or as amounting themselves to an actual demise. As a general rule it may be laid down, that when the clear intention of the parties appears to be that a more formal instrument shall be prepared between them, and that the agreement produced is merely to ascertain the terms of such future instrument, the agreement shall be considered as executory only, and not as conveying any legal interest; and on the other hand, that when the agreement purports to be a final settlement of their rights, it shall be deemed a lease, however informally it may be drawn up: and even in the case of an agreement for a future lease, if such agreement expressly provide that it shall operate as a lease until the more formal lease shall be prepared and executed, it shall have the same effect. Thus a paper writing [2], containing words of present demise, with an agreement that the lessee shall take possession immediately, and that a lease shall be executed at a future time, but making no further provision for the intermediate holding, is only an agreement for a lease. So an instrument, reciting that *A.* had agreed that in case he should be entitled to certain copyhold premises on the death of *B.* he would immediately demise the same to *C.* and declaring that he did thereby agree to let and demise the same to him, and promise to procure the license of the lord, was also determined to be no demise [3]. Many other cases [4] have occurred to the same effect; but in *Poole* v. *Bentley* [5], which arose on an instrument whereby *A.* agreed to let, and *B.* agreed

[1] Vide Goodtitle dem. Estwicke v. Way, 1 T. Rep. 735.

[2] Ibid.

[3] Doe dem. Coore v. Clare, 2 T. Rep. 739. See also Fenny dem. Eastham v. Child, 2 M. & S. 255.

[4] Roe dem. Jackson v. Ashburner, 5 T. Rep. 163. Doe dem. Dowding v. Bissel, 3 Taunt. 65. Tempest v. Rawling, 13 East, 18. Doe dem. Bromfield v Smith, 6 East, 530.

[5] 12 East, 168.

agreed to take certain land for sixty-one years at a certain rent for building, and the tenant agreed to lay out 2,000*l.* within four years, in building five or more houses; and when five houses were covered in, the landlord agreed to grant a lease or leases, but the agreement was to be considered binding till one more fully prepared could be produced; the court considered the latter words as showing that the future and more formal instrument was merely for further assurance, and that the agreement itself in the meantime amounted to a complete and actual demise.

In cases where the quantum of rent has not been fixed upon by the parties, the plaintiff, in addition to the evidence above stated, should be prepared to prove the annual value of the premises during the time of the defendant's occupation.

The defendant who has so occupied by the permission of the plaintiff, will not be suffered to dispute his title by showing that he had no legal estate or power to demise, as that he had been simoniacally presented to the living, the glebe of which the defendant had occupied as his tenant[1], or that he had previously demised to another person, whose term had not expired when the defendant by his consent entered into possession[2]. But though the defendant is precluded from disputing his landlord's title to demise, he is at liberty to show that the plaintiff had only a temporary interest at the time of the demise, which has since expired[3]; or that he has subsequently mortgaged[4] the estate to another person, who has given the defendant notice to pay his rent to him; or that the tenancy has been determined either by a regular notice to quit on the one side or the other[5], or an actual delivery up of possession by the defendant to the plaintiff, and an acceptance by him[6]. To prove these facts he must be prepared with the regular evidence to show what the plaintiff's

[1] Cooke *v.* Loxley, ante, 25.

[2] Phillips *v.* Sculthorpe, 1 B. & A. 30.

[3] Morgan *v.* Ambrose, ante, 255. England dem. Sybourn *v.* Slade, 4 T. Rep. 682.

[4] Holmes *v.* Pontin, Peake's Cas. 99.

[5] Redpath *v.* Roberts, 3 Esp. Cas. 225.

[6] Whitehead *v.* Clifford, 5 Taunt. 518.

Part II. *Action for Mismanagement of Farm.*

title originally was, or the deeds by which he has parted with it, or the notice given, for the mere fact of the defendant having once been tenant is sufficient to establish the plaintiff's case.

Evidence in Action for Mismanagement of Farm.

[245]

THE action against a tenant for not properly managing a farm, will require but few observations. If the misconduct consist in the breach of an actual agreement, the agreement and breach of it must be regularly proved; and here it may be observed, that an agreement to take a farm on certain terms, to be made the subject of covenant in a future lease, will, after entry and payment of rent, be considered as so far creating a tenancy as to warrant a declaration stating that the plaintiff had demised to the defendant [1]. If nothing was said about the terms of holding at the time of the demise, (in which case the law implies a promise to manage according to the course of good husbandry in the country [2]), the evidence ought to show what that course is, and how the defendant has deviated from it. Thus, if a landlord sue his tenant for taking the hay and straw from off the land, and selling or consuming it elsewhere, the landlord must prove that by the course of husbandry in the neighbourhood, the hay and straw ought to be consumed on the farm; for as to this there is no general rule, some countries growing hay, &c. for the mere purpose of being sold [3]. But if the tenant take away the dung which arises on the farm, cut down trees which grow upon it, or plough up the meadow land, the landlord will not be obliged to prove this to be contrary to the custom of the country; it being contrary to the rights of a landlord, as settled by the general rules of law which govern every part of the kingdom [4].

[1] Tempest v. Rawling, 13 East, 18.

[2] Powley v. Walker, 5 T. Rep. 373.

[3] Legh v. Hewit, 4 East, 154.

[4] Furber v. Andrews, cor. Buller, J. Winton. Sum. Ass. 1788; Gough v. Howard, cor. Lawrence, J. Salop, Sum. Ass. 1801.

Evidence in an Action on an Attorney's Bill.

Ch. II. s. 2. *Action on an Attorney's Bill.*

THE action by an attorney for his bill differs from all others on contract, in this, that where the cause of action is for business done in the course of a legal proceeding, it is necessary by the positive directions of an act of parliament, that the plaintiff should deliver a bill, signed by himself, a month previous to the commencement of his action. It will be incumbent on him, therefore, to prove this fact before he can be permitted to proceed; and to enable him to do this, he should either produce a copy of the bill delivered, also signed by himself, or else give notice to the defendant to produce the one which was delivered [1]. It must also be proved that the bill was left with the defendant, or at his place of abode, for the mere delivery of it into his hands, if he return it immediately, is not sufficient, though he promise to pay the money [2]. So it was ruled by Lord *Eldon* at *Nisi Prius*, that a delivery at the counting-house of the defendant, who dwelt elsewhere, was not sufficient [3]. But if two persons employ an attorney, and one of them gives all directions and orders about the business, a delivery to the person so acting is sufficient to charge both [4], as is a delivery to an attorney appointed by the defendant to succeed the plaintiff in the conduct of a suit [5].

2 Geo. 2. c. 23.

[1] Vide Anderson v. May, ante, 104. [246]

[2] Brooks v. Mason, 1 H. Black. 290.

[3] Hill v. Humphreys, 4 Esp. 254.

[4] Finchet v. How, 2 Campb. 277.

[5] Vincent v. Staymaker, 12 East, 372.

This act of parliament has always received a liberal construction in favour of the client. If any part of the bill be for business done in a court of justice, it is within the statute; the charge for an affidavit of debt, engrossed and sworn, though no writ was actually sued out [6], or for a *dedimus potestatem*, in a bill in other respects entirely for conveyancing [7], has been held to be sufficient for this purpose;

[6] Winter v. Payne, 6 T. Rep. 645.

[7] Ex parte Pricket, 1 Bos. & Pul. N. R. 266.

Part II. *Action on an Attorney's Bill.*

purpose; and though all the business were at the *quarter sessions*[1], or on obtaining a bankrupt's certificate[2], or the attorney charged nothing but what he actually expended[3](*l*), it is still necessary to prove the bill delivered before he can maintain his action. But where no business has been done in court, as where an affidavit and bond to the chancellor were prepared with a view to a commission of bankruptcy, but the affidavit was never sworn[4]; or where the whole of the demand is for *conveyancing*, it is not necessary to deliver any bill; neither is it necessary where the action is brought by one attorney against another, though all the business were done before the defendant became an attorney[5]. So where an agent to a country attorney brings an action against his principal[6]; or the executor or administrator of an attorney brings an action for business done by the deceased[7]; it is not necessary for the plaintiff, in either of these cases, to prove the formal delivery of a bill according to the statute; and if an attorney himself be defendant, he may *set off*[8] his demand without delivering a bill, in which case, however, he should deliver his bill time enough to enable the plaintiff to get it taxed before the trial.

[247]

The plaintiff, in cases within the statute, must also give general evidence of the business having been done; and prove his retainer, either by direct evidence of that fact, or at least by the circumstance of the defendant from time to time appearing as a party, and giving directions about the cause[9]. The quantum or reasonableness of the bill is never entered

[1] Clarke *v.* Donovan, 5 T. Rep. 694.

[2] Collins *v.* Nicholson, 2 Taunt. 321.

[3] Miller *v.* Towers, Peake's Cas. 102.

[4] Burton *v.* Chatterton, 3 B. & A. 486.

[5] Ford *v.* Maxwell, 2 H. Blac. 589.

[6] Bridges *v.* Francis, Peake's Cas. 1.

[7] Griffith, Adm. *v.* Squire, Cooke's Cas. Prac. 58, and Bul. N. P. 145.

[8] Martin *v.* Winder, cited Dougl. 199.

[9] Williams *v.* Frith, Dougl. 198.

(*l*) This must be understood where the whole bill is for business in some manner connected with the plaintiff's profession, for if he lay out a sum of money for another, merely as a friend, and give an account of it in his bill, he will not be precluded from recovering that as money paid to the defendant's use. *Mowbray* v. *Fleming*, 11 East, 285.

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into at *Nisi Prius*; but if the defendant mean to dispute that, he must obtain an order to tax the bill before the master. Bills for conveyancing, and other business not within the statute, are open to discussion at *Nisi Prius*; and, therefore, in these cases the plaintiff must not only prove his retainer and the business done, but also the reasonableness of the charges.

Ch. II. s. 2. *Action on an Attorney's Bill.*

SECTION III.

Of the Evidence on behalf of the Defendant, and the Plaintiff's Evidence on particular Pleas.

On the General Issue.

Ch. II. s. 3. *Want of Consideration.*

THE pleas to which a defendant is entitled in this action are as various as the different transactions of mankind; but many things which were formerly pleaded, may now be taken advantage of, on the general issue, *non assumpsit*. By that plea the defendant puts the plaintiff on proving the whole of his case, and entitles himself to give in evidence any thing which shows that no debt was due at the time the action was commenced, whether on account of the promise being originally void for the want of a good and legal consideration, or by reason of the demand having been since satisfied.

[248]

If the plaintiff's demand be compounded of skill and materials, and he has grossly misconducted himself, as where an apothecary, giving medicines on his own judgment, and not under the directions of a physician, appears to have been grossly negligent or ignorant, this fact furnishes a defence on the general issue. So in the case before alluded to, if a portrait be not a likeness, the failure of skill takes away all

Kannen v. M'Mullen, Peake's N. P. Cas. 59.

Part II. *Want of Consideration.*

title to payment[1]. But, in general, the circumstance of work or materials not being so good as contracted for by the plaintiff, where the defendant has received *some* benefit, does not furnish any defence to the action; but the defendant must seek his remedy by a cross action against the plaintiff for not fulfilling his contract (*m*).

[1] Grimaldi *v.* White, 4 Esp. Cas. 95.

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(*m*) The practice of different judges on this subject has not been by any means uniform. Lord *Mansfield* is said to have held, that in no case could the improper performance of the work be made the subject of inquiry in an action for the performance of it; and Mr. J. *Buller*, in a case of *Broom* v. *Davis*, Taunt. Lent Ass. 1794, determined, that where a booth had been built for a stipulated price, the ill construction of it afforded no defence to an action for work and labour. In the case of *Grimaldi* v. *White*, above-mentioned, where the defendant had it in his power to return the portrait, Lord *Kenyon* held the same doctrine: but in that of *Kannen* v. *M'Mullen*, and in several others cited in 7 East, 480, his lordship held, that where, from the improper conduct of the plaintiff, the defendant had received *no* benefit, it afforded a defence to the action. In another case of *King* v. *Boston*, Midd. Sitt. after East. 1789, Lord *Kenyon* held, that where a horse was sold for twelve guineas, and warranted sound, and the defendant had paid three, the defendant in an action for the price of the horse, might prove the unsoundness, and that a guinea and a half was the full value of it. The cases on the subject were all (except that last cited in this note) brought before the court in a late case of *Basten* v. *Butter*, 7 East, 479, Trin. 46 Geo. 3, where the plaintiff, a carpenter, having contracted to make some buildings on the defendant's farm (the defendant finding timber) performed the work so badly that it fell down, and the court determined that this fact might be given in evidence on the *quantum meruit*, though no notice had been given to the plaintiff of such a defence. And *Lawrence* and *Le Blanc*, justices, intimated an opinion, that even in cases where the plaintiff stipulated for a certain price, if the defendant gave previous notice of such his defence, he might be permitted to show that the plaintiff had not entitled himself to that price, by performing the work according to his agreement. The Common Pleas, however, in Hilary Term preceding, held that the negligence of an attorney, in not opposing the justification of bail, could not be made the ground of defence to an action on his bill. In that case the chief justice said he would not go the length of saying, that in no case could negligence in the party suing be used as a defence to the action, though he thought it could only be used where the negligence had been such, that the party, for whom the work was done, had thereby lost all possibility of benefit from such work; but that was not the case there, since a judgment had been obtained, and its fruits might thereafter

Ch. II. s. 3. *Payment.*

The most simple defence to a demand established by the plaintiff is to show that it has been satisfied; the proof of which lies wholly on the defendant. This may be done either by payment of money, or by the delivery of some other thing in satisfaction of the debt. In the last case, the defendant must [249] prove the agreement of the plaintiff to accept the thing in satisfaction, and that it was so delivered by the defendant, and accepted by the plaintiff. In answer to this, it will be open to the plaintiff to prove, on his part, that the thing delivered was not intended to be a complete satisfaction, but only a partial payment. Where the payment is in money, after the day of payment is past, no such question can arise, for the payment of a less sum, after the promise is broken, can never be set up as a discharge of a greater, though accepted by the creditor as such, unless he execute a formal release under seal. In this case, therefore, only two questions can arise;

Fitch v. Sutton, 5 East, 230.

1st. The fact of payment.

2d. The application of the money paid.

thereafter be had by the defendant. Mr. J. *Rooke* appears also to have taken the distinction between the case of a partial benefit and none at all being rendered to the defendant; but the other judges (*Heath* and *Chambre*) seem to have been of opinion that no degree of negligence could furnish a defence, but that it must be made the subject of a cross action. *Templer* v. *M'Lachlan*, 2 Bos. & Pul. N. R. 136. Vide *Farnsworth* v. *Garrard*, Campb. N. P. 38. *Fisher* v. *Samuda*, Ibid. 190. In the first of which Lord *Ellenborough* held, that a man being employed to build a wall, and having built it so inartificially that it was obliged to be taken down, was not entitled to recover any thing for his work; but that if the wall, as it then stood, might be taken down and rebuilt with the same materials at less expence than it could without them, the plaintiff was entitled to recover *pro tanto*. And in *Lewis* v. *Cosgrave*, 2 Taunt. 2, it was holden, that in an action on a banker's check given as the price of a horse, which the plaintiff knowing to be unsound had warranted sound, the defendant, having tendered back the horse, might make the breach of warranty a defence to the action.

The

Part II. *Payment.*

The fact of payment, if made to the plaintiff in person, and a receipt on a proper stamp were given, is proved by evidence of the plaintiff's hand-writing: in other cases it is generally proved by the testimony of some person who was present when the money was paid. But the fact of payment may be presumed from circumstances without any direct proof. Mere length of time will, as we have before observed [1], afford in many cases a presumption of payment; and on a similar principle Lord *Kenyon* held, that proof of the plaintiff and other workmen having come regularly to receive their wages from the defendant at stated times, and the plaintiff never having been heard to complain that he had not been paid [2], was presumptive evidence of payment in an action brought at a distant time afterwards. If the money be paid to a servant, or other third person, for the use of the plaintiff, it must be shown, in addition to the fact of payment, that the person to whom the payment was made, had either a general authority to receive money, as being accustomed to receive it in the plaintiff's shop, or the like; or else that he had a particular authority for the occasion. As where a man sends a horse to a fair to be sold, the presumption is, that he means to entrust the person who has the horse rather than a mere stranger with the money, and therefore payment to him is payment to his principal [3]. So where a broker sells the goods of *A.* to *B.* without naming his principal, and gives the usual bought and sold note to the buyer and the seller, and the buyer afterwards pays him, this is payment to the principal [4]; and if the buyer, having bought other goods of the same broker, pay him generally, on account, a sum of money more than sufficient to satisfy one demand, but not enough to discharge both, each of the sellers must, in

[1] Ante, 28.

[2] Lomas v. Nevesilienski, 1 Esp. N.P.C. 296.

[250]

[3] Anon. 12 Mod. 230.

[4] Favenc v. Bennett, 11 East, 36.

Ch. II. s. 3. *Payment.*

in case of the insolvency of the broker, apply a proportionable share of the money received by the broker towards the discharge of his debt, and can only recover the balance. Payment to the plaintiff's attorney, after he is privately changed, without leave of the court, is also a good payment to the plaintiff[1]; but payment to a country attorney, to whom he who is properly concerned for the plaintiff sends a writ for the mere purpose of getting it executed, is not sufficient[2]; neither will a payment made to an attorney on record, but who, in fact, was never employed by the plaintiff, discharge the defendant[3]. So that in all these cases the defendant should be prepared to show that the attorney was employed by the plaintiff.

[1] Powell *v.* Litle, 1 Black. 8.

[2] Yates *v.* Freckleton, Dougl. 623.

[3] Robson *v.* Eaton, 1 T. Rep. 62.

If a bill of exchange be paid by the defendant to the plaintiff, and the plaintiff is guilty of negligence in not giving notice of its dishonour, this will be considered as payment. But where the promissory notes of a banker were given in payment for goods at the time of the purchase, which notes afterwards turned out to be of no value, on account of the banker having then stopped payment, it was held that this was no satisfaction of the debt, unless the seller expressly agreed to run the risk of their being paid[4]. If the creditor desire his debtor to remit a bill by the post, and the letter containing it miscarry, the creditor must stand to the loss[5]. But in such a case it has been held, that the delivery of the letter to a bellman in the street, and not at a regular receiving house, is not a compliance with the directions of the creditor, and that in case of its miscarriage when so delivered, the loss will fall on the person so improperly sending it[6]. On the same principle it would probably be held, that the sending of bank-notes uncut would not discharge the debtor, where he was directed in general terms to remit by the

[4] Owenson *v.* Morse, 7 T. Rep. 64.

[5] Warwic *v.* Noakes, Peake's N. P. Cas. 67.

[251]

[6] Hawkins *v.* Rutt, Peake's Cas. 186.

Part II. *Payment.*

the post, because amongst prudent people it is usual to cut such securities in halves, and send them at different times. In case the creditor gave no specific directions as to the mode of remittance, the proof of putting the letter containing the bills or notes into the post, would be *prima facie* evidence of their safe arrival; but this might be answered by proof, on the part of the creditor, that the bills or notes got into other hands, and were received by some person with whom he had no connection. The mere circumstance of the defendant having drawn a check on his banker, payable to the plaintiff or bearer, affords no proof of payment, because, being payable to bearer, it does not appear that it was ever in the hands of the plaintiff; but if he endorse his name on it, this is sufficient to call upon him to show that it was paid on some other account [1].

[1] Egg v. Barnett, 3 Esp. Cas. 196.

As to the application of money paid, the rule is, that the person paying may direct the application of it; and, therefore, where there are more accounts than one between a debtor and his creditor, as, for instance, one debt on a bond, and another on a simple contract, if the debtor, when he pays a sum of money, declare that he pays it specifically on either of these accounts, the creditor cannot afterwards place it to the other [2]. But if the payment be general, and no specific application made by the debtor at the time of payment, the creditor may, unless in cases where the debtor is indebted in different characters, or, having ceased to be a trader, subjected himself to the operation of the bankrupt laws, or where the interest of third persons would be affected, place the money paid to which account he pleases. Thus where the plaintiff served the defendant three years under an indenture, and three more under a simple contract, having during both periods received goods and money generally on account

[252]

[2] Anon. Cro. El. 66.

account of wages, the whole of which receipts would, if placed to the account of the first service, be more than sufficient to satisfy it, but which were all blended in one account. He afterwards brought two actions, the one in covenant, the other in *assumpsit*, upon which the defendant attempted to appropriate so much of the payment, as was sufficient to satisfy the first account, to the action of covenant, but the court held, that the plaintiff had his election to ascribe to the second debt, for which he had the worst security, the money received during the second period, and might therefore recover in both actions[1]. But where one account is with the debtor in his own right, and the other as executor, the law will consider the payment as made on account of himself individually, and will not permit the creditor to apply it to any other account[2]. So where a trader being indebted pays money, and after leaving off trade contracts a further debt, and makes further payments, if nothing be said as to the application, the law applies the payment to the first debt, so as to prevent the creditor from taking out a commission of bankruptcy, if sufficient has been paid to reduce the debt, contracted while the party was a trader, under 100*l.*[3] for it shall be intended that the party, who made the payment, did not mean after he had ceased to be a trader that the old debt should remain unextinguished, so as to make him liable to the bankrupt laws.

[1] Peters *v.* Anderson, 5 Taunt. 596.

[2] Goddard *v.* Cox, 2 Stra. 1194.

[3] Meggot *v.* Mills, 1 Lord Raym. 286. Dawe *v.* Holdsworth, Peake's Cas. 64, as explained 5 Taunt. 602.

Again, where *A.* having dealt for a long time with *B.* and *C.* as partners, not knowing that they had a third partner, furnished them with goods, and received money on account generally, continuing the same course of dealing after the secret dissolution of the partnership, after which some bills paid during the partnership were dishonoured and delivered up on new good bills being paid in lieu of them; it was holden[4], that such delivery up of the old dishonoured bills,

[4] Newmarsh *v.* Clay, 14 East, 239.

Part II. *Payment.*

bills, upon receipt of the new good ones, was evidence of a particular appropriation of such new bills in payment and discharge of the old debt; and that the secret third partner might avail himself of such discharge, in an action against himself, jointly with *B.* and *C.* Lastly, where a person keeping cash with a banker, deposited with him the note of a third person for a sum of money, telling him at the same time that it was a note made for his accommo-

[253]

dation, and afterwards paid a sum of money into the banker's hands without making any specific appropriation of it, Lord *Kenyon* held that this money must be placed, as far as it would go, towards the discharge of the then existing debt[1], and that the banker could not hold the maker of the note responsible for more than the balance remaining due at the time of such payment, though he afterwards trusted his debtor with a further sum of money.

[1] Hammersley v. Knowlys, 2 Esp. Cas. 66.

The most ordinary special pleas are,

1. A set-off of a debt due from the plaintiff to the defendant.

2. The statute of limitations.

3. A tender of the money before the commencement of the action.

Set-off.

As to the first, it should be observed, that where a particular sum of money is received by the defendant, who is entitled to retain a part of it for his labour; or the plaintiff agrees to money being retained by the defendant to satisfy himself some other demand; these are not properly matters of set-off, but are evidence under the general issue as payment[2]. But where it becomes necessary for the defendant to have recourse to the statute of set-off, he must prove the same facts in support of his counter demand, as if he himself were plaintiff in another action; and if he has not pleaded his set-off, but given notice of it, he must be prepared to prove the

[2] Dale v. Sollet, 4 Burr. 2 33.

[254]

delivery

delivery of such notice. A set-off can only be made where both the plaintiff's and defendant's demands are certain and liquidated.

The statute of *limitations* is pleaded in two forms; as, first, that the defendant did not undertake within six years next before the commencement of the action; or, secondly, that the cause of action did not accrue within that time. The last form is applicable to all cases, and the only one that can be made use of where the promise is executory, viz. to pay money, or do an act at a distant time; for till that time is past, no cause of action accrues[1]. But as soon as the cause of action has accrued, the time begins to run; and in those cases where the cause of action arises from the negligence of the defendant, or the non-performance of a duty, they cannot be revived by a new damage arising to the plaintiff, or acknowledgment by the defendant. As where the defendant sold wheat to the plaintiff as spring wheat, which the plaintiff in consequence re-sold as such, and was afterwards obliged to pay damages recovered against him by the person to whom he sold, the court held his cause of action to have arisen at the time he discovered the wheat to be of a different quality from that for which it was sold, and not at the time when the judgment was recovered against him by the person to whom he sold[2]. So where an attorney being employed to search at the Bank of England, whether stock was standing there in the names of certain persons, omitted to make the search, and on the discovery of the omission six years afterwards, said that the neglect arose from the omission of his clerk, and that he must be responsible, it was held that the cause of action arose at the time of the neglect, and was not revived by the subsequent acknowledgment[3]. But in cases of mere debts due above six years, a promise

[1] Gould *v.* Johnson, 2 Lord Raym. 838; Salk. 422; S.C. Puckle *v.* Moor, 1 Vent. 191.

[2] Bailey *v.* Faulkner, 3 M. & S. 288.

[3] Short *v.* M'Carthy, 3 B. & A. 626.

Part II. *Statute of Limitations.*

promise or acknowledgment of the debt by the defendant within that time, before the commencement of the action, will revive the debt. Where a mutual unliquidated account, consisting of cross demands, is subsisting between the parties, if any item be within six years, this prevents the operation of the statute on the rest, for each new item is an acknowledgment that the account remains unsettled[1]: but, if the demand be all on one side, one item being within six years, will not take the others out of the statute[2] (n). In cases where the statute has operated, a very little matter has been held to be sufficient, and the slightest acknowledgment, whether made to the plaintiff, or in any dealings with a third person in which he had no concern[3], will raise a fresh promise, or give a fresh cause of action. Thus, if the defendant say, "prove your debt, and I will pay you[4];" or, "I am ready to account, but nothing is due[5] (o);" or, "if he has any demand on me, it shall be settled[6];" or, on meeting the plaintiff soon after the delivery of his bill, say, "you have made an extravagant demand;" without insisting that it has been paid[7]; or, "that he was surety for another person who had the money, but that he is willing to pay half of it[8];" or, "that the

[1] Catling *v.* Skoulding, 6 T. Rep. 189. Cranch *v.* Kirkman, Peake's Cas. 121.

[2] Cotes *v.* Harris, Bul. N. P. 149.

[255]

[3] Mountstephen *v.* Brooke, 3 B. & A. 340.

[4] Heyling *v.* Hastings, Salk. 29.

[5] and [6], by Ld. Mansfield, in Trueman *v.* Fenton, Cowp. 548.

[7] Lawrence *v.* Worral, Peake's Cas. 93.

[8] Yea, bart, *v.* Fouraker, 2 Burr. 1099.

(n) The exception in the statute as to *merchants accounts* does not properly fall within the plan of this work, which, as often before observed, is confined to the proof required in actions, and is not intended to discuss the law, further than is necessary to point out the evidence required; but I cannot avoid referring the reader to the very elaborate and learned note of Mr. Serjeant *Williams*, on this subject, in his edition of *Saunders*, vol. i. p. 127.

(o) In *Sims* v. *Sowel*, 2 B. & A. 759, the plaintiff showed the defendant the note on which the action was brought within six years; on which the defendant said, "you owe me more money, I have a set-off against you: *Bayley* and *Holroyd*, JJ. (dissentiente, *Best*, J.) held, that this was not a sufficient acknowledgment to take the case out of the statute.

plaintiff

plaintiff had paid money for him twelve years ago, but that he had since become a bankrupt, by which he was discharged as well as by law from the length of time the debt accrued[1];" or, "that he did not consider himself as owing the plaintiff a farthing, it being more than six years since he contracted[2];" or, "that the acceptance was in his hand-writing, and that he had been liable, but that he was not so then, because it was out of date, and it was not in his power to pay it[3];" all these being acknowledgments that the defendant was once liable, and that there is an unsettled account between the parties, the law raises a promise to pay, on the plaintiff proving the existence of the debt. So a letter written by the defendant to the plaintiff, on being sued, couched in ambiguous terms, neither expressly admitting nor denying the debt, may be left to the jury to consider, whether it amounts to an acknowledgment[4]; and even an affidavit made for the express purpose of obtaining leave to plead the statute, stating, that since making the bill of exchange on which the action was brought, no demand had been made, may be so left[5]. But if the defendant deny that any debt was ever due, as if he say, in an action by an executor, "I acknowledge the receipt of the money, but the testator gave it me[6];" this does not take the case out of the statute. Payment of interest, by one of several makers of a joint and several promissory note[7], takes it out of the statute as to all; and it was in one case holden, that if one become bankrupt, and the creditor prove his debt, and receive a dividend under his commission, this takes it out of the statute, as against the others also[8]; but this decision has been recently overruled[9].

The plea applying to the time of the commencement of the action, as it appears on the declaration,

[1] Clarke *v.* Bradshaw, 3 Esp. Cas. 155.

[2] Bryan *v.* Horseman, 4 East, 599.

[3] Leaper *v.* Tatton, 16 East, 420.

[4] Lloyd *v.* Maund, 2 T. Rep. 769.

[5] Rucker *v.* Hannay, 4 East, 604, n

[6] Owen *v.* Wooley, Bul. N. P. 148.

[7] Whitcomb *v.* Whiting, Dougl. 652.

[8] Jackson *v.* Fairbank, 2 H. Blac. 340; [256] Budd *v.* Birkenhead, Salk. 420.

[9] Brandram *v.* Wharton, 1 B. & A. 463.

Part II. *Statute of Limitations.*

it is necessary for the plaintiff, in cases where the promise was not made within six years before that time, but where a writ was sued out and returned within six years after the cause of action accrued, to state such writ and the day it issued specially in the replication.

[1] Smith v. Bower, 6 T. Rep. 662.

Where there have been more writs than one[1], it must appear that they are regular continuances of each other, as a *latitat* on a bill of Middlesex, or the like; for an attachment of privilege would be no continuance of a common writ, being process of a different nature.

To this replication the defendant rejoins, either by denying the writ, if none in fact issued, or stating the exact day it was sued out, if the plaintiff only mentions the *teste*, and pleading that he did not undertake within six years next before the suing it out. In the last case the plaintiff's evidence will be the same as if he had traversed the plea, except as to the time. In the other a matter of record being put in issue, namely, the suing forth a writ duly returned and filed, the court inspects the record, and gives judgment as in other cases on the plea of *nul tiel record*.

[257]

The plaintiff may also reply that he originally commenced his action in an inferior court within six years, and that the defendant removed it by *habeas corpus*[2]; or that he obtained a judgment or an outlawry on an original within that time, which has since been arrested or reversed[3], and that he commenced the present action within a year after the reversal. So if a man commence an action and die[4]; or a *feme sole*, after the commencement of an action by her, marry, whereby it abates[5], the executor or administrator in the one case, and the husband and wife in the other, have a reasonable time (which is generally understood to be a year) to commence a fresh

[2] Matthews v. Phillips, Salk. 424; Gawer v. James, Bul. N. P. 151.

[3] Finch v. Lambe, Cro. Car. 294. Whitwick v. Hovenden, 3 Lev. 345.

[4] Matthews v. Phillips, ut sup.

[5] Forbes v. Ld. Middleton, Willes, 259. note (c).

fresh action, and may reply the fact to a plea of the statute. The defendant may, by his rejoinder, of course deny any of the facts so stated, and the issue will lie on the plaintiff to prove them, either by proof of the matter of record in the usual way, where that is traversed, or by proof of the matter in *pais*, before a jury, where such matter is put in issue.

When the plaintiff would excuse himself for not commencing his action in time, by reason of his being under either of the disabilities mentioned in the statute, such disability must be specially stated in the replication, and it must be added, that the action was commenced within six years after the removal of it; and, if the disability be traversed, the plaintiff must prove the existence and continuance of it.

[258]

Tender.

The plea of *tender* goes only to defeat the plaintiff's right to costs, and therefore the defendant who pleads it, is always obliged to pay into court, for the use of the plaintiff, as much as he admits to be due[1]; and cannot plead the general issue, to the same part of the declaration as that to which he applies his tender; but can only plead a tender as to part of the damages, and the general issue as to the residue. The plaintiff may traverse both the tender and the general issue, and then it will be incumbent on *him* to prove that the defendant was indebted to him in a larger sum than he admits, and on the defendant to prove his tender. If the plaintiff fail on the first issue, the tender will be the only matter in dispute, and to support this, the *defendant* must prove that he offered to pay the money, either to the plaintiff or an agent who was authorized to receive payment[2], and had it with him to pay. If the plaintiff make no objection to receive it, the defendant should put it down for him, for holding it in a bag

[1] Maclellan *v.* Howard, 4 T. Rep. 194.

[2] Goodland *v.* Blewitt, 1 Campb. 477.

Part II. *Tender.*

under his arm is not sufficient[1]; but if the plaintiff refuse to receive the money tendered, contending that more is due, he cannot afterwards object to the formality of the tender. Thus, though a person must regularly tender *money*, and not *bank-notes*[2], and the exact sum without asking for change[3], or a receipt[4]; yet, if when such informal tender is made, the creditor does not object to receive it on that account, but on account of more being due, he will not afterwards be permitted to object to it on the trial[5]. And even if the cash-notes of a country bank are tendered, and no objection is made on that account, the tender will be deemed sufficient[6]. So where the defendant's agent, having taken out his pocket-book, offered to pay the plaintiff's debt if he would go to a neighbouring public-house, and the plaintiff refused, this was held a good tender[7]. But in all cases it should appear either that some money was produced, or that the creditor expressly said he would not receive it[8].

[259]

But these are not the only replications that may be made to this plea; the plaintiff may reply a special demand by him, and refusal by the defendant to pay at any time, either before or subsequent to the time of the tender, for if the defendant has ever refused to pay the money, his tender will not avail him[9]; and for this reason a tender after the day of payment, in a bill of exchange, is no bar to the action[1]. If this demand and refusal be traversed, the issue will of course be on the plaintiff to prove it; and to support the issue on his part, it will be necessary for him to show that the demand was of the sum tendered, for if the defendant tender 5*l.* the plaintiff cannot avoid the effect of it by afterwards demanding 10*l.*[2] The demand must also be made either by the plaintiff himself, or some one authorized to give a discharge for the money. Thus a demand

[1] Vide B.N.B. 151.
[2] Wright *v.* Reed, 3 T. Rep. 554; 2 B. & P. 526.
[3] Black *v.* Smith, Peake's Cas. 88.
[4] Cole *v.* Blake, ib. 179. Sed vide Glascot *v.* Day, 3 Esp. Cas. 48, and Huxham *v.* Smith, 2 Campb. 21.
[5] See the above cases.
[6] Lockyer *v.* Jones, Peak. N. P. Cas. 3d ed. 239.
[7] Reed *v.* Golding, 2 M. & S. 86.
[8] Dickinson *v.* Shee, 4 Esp. Cas. 67.
[9] Giles *v.* Hart, Salk. 622; 1 Ld. Ray. 254. S. C.
[1] Hume *v.* Peploe, 8 East, 168.
[2] Spybey *v.* Hyde, 1 Campb. 181.

demand by a clerk to the plaintiff's attorney, who had never seen the debtor before, will not be sufficient [1]. Ch. II. s. 3. *Tender.*

If the tender were, in point of fact, made after the commencement of the action, but before the exhibiting the bill, the plaintiff may in this, as in the former instances, show the actual commencement of his action, by stating the writ in his replication [2]; and the defendant may rejoin that there was then no cause of action, or that he tendered before the day on which the writ was sued out. On the first rejoinder it will be incumbent on the plaintiff to prove the time when the cause of action accrued; on the other, the defendant must show the day on which he made his tender [3].

[1] Coles *v.* Bell, 1 Camp. 478.

[2] Johnson *v.* Mapletoft, 1 Lutw. 227. Hume *v.* Peploe, 8 East, 168.

[3] Wood *v.* Newton, 1 Wils. 141.

I shall mention two defences more, which may be either specially pleaded in bar, or given in evidence on the *general issue*, and these are the *infancy* or *coverture* of the defendant at the time of the contract; but if a promise be made at the time a woman is sole, and she marry afterwards, this must be pleaded in abatement. *Infancy.* [260]

To the plea of *infancy*, the plaintiff may reply, first, by denying the infancy.

Secondly, That the defendant ratified the promises after he came of age.

Lastly, That the things furnished were necessary for his degree. If the defendant give his infancy in evidence on the *general issue*, the plaintiff may prove either of these three facts in reply.

In the two first cases it is sufficient for the plaintiff, in the first instance, to prove a promise; and it is incumbent on the defendant to show the time of his birth, for this fact cannot be supposed to be in the knowledge of the plaintiff; but if, upon a replication of a ratification after age, the defendant establish his nonage, at the time of the original

Borthwick *v.* Carruthers, 1 T. Rep. 648.

Part II. *Infancy.*

contract, it is then incumbent on the plaintiff to prove an express promise to pay after he attained his age. A bare acknowledgment of the debt is not sufficient in this case [1], as in the case of the statute of limitations, for the law protects an infant, and implies no promise further than for those things which are necessary for his support. In this case, therefore, the payment of part of the debt after age, without any promise to pay the remainder, will not bind him to do so [2]; and if he promise to pay a part of the debt, it will bind him so far and no farther [3].

To support the replication of necessaries, the plaintiff must prove the station and condition in life of the defendant, and that the things furnished for him were suitable and agreeable to that station; and if he fail in establishing this fact, the jury should find for the defendant [4]; but the judge must leave the question to them, and cannot determine, as a mere question of law, that certain things are not necessaries [5]. Every infant is chargeable for necessary victuals and clothing for himself [6], his wife [7], or lawful child [8]; and one bearing a captain's commission in the army has been held liable for a livery provided by his orders for his servant, for this is equally necessary for the honour and credit of his station [9]. But as the law acknowledges no discretion in an infant, it will not permit him to be charged by any contract not absolutely necessary for his existence; and, therefore, for cockades found for the soldiers, by order of the defendant in the last case, he was holden not to be liable [1]. So he is not liable for goods provided him to sell again, though he keeps an open and public shop, for he has not discretion to carry on business [2]; and even money lent him to purchase necessaries, unless actually so applied by him, is not recoverable [3]; and no action can

[1] Lara *v.* Bird, Sitt. after H.T. 31 Geo. 3, MS.

[2] Thrupp *v.* Fielder, M. S. Esp. 628. S. C.

[3] Green *v.* Parker, Abingdon S. Ass. 1755. cor. Forster, J. MS.

[4] Bliss *v.* Palmer, cor. [261] Abbot, J. Oxford Sum. Ass. 1816.

[5] Madox *v.* Miller, 1 M. & S. 378.

[6] Vide Bul. N. P. 154.

[7] Ib. 155.

[8] Scott *v.* Nelson, M. S. B. N. P. 155. S. P.

[9] Hands *v.* Slaney, 8 T. Rep. 578.

[1] Ibid.

[2] Green *v.* Parker, sup. Whittingham *v.* Hill, Cro. J. 494; Whywall *v.* Champion, 2 Stra. 1083; but Mr. B. Clarke, in one case held otherwise, vide B. N. P. 154.

[3] B. N. P. 154.

can be maintained against him on an account stated, though the particulars of such account were for necessaries [1].

[1] Truman *v.* Hurst, 1 T. Rep. 40. Barthett *v.* Emery, ib. 42, n.

On the part of the defendant, on this issue, it may be shown, that he was provided by his parents or friends with things necessary for his condition; and, if that appear to be the case, whether known to the plaintiff or not, it is the bounden duty of a jury, though oftentimes unwillingly performed by them, to find a verdict for the defendant; for the law in favour of infants was wisely made to afford them protection at a time of life when they have not wisdom to protect themselves [2].

[262]

[2] Ford *v.* Fothergill, Peake's Cas. 229. 1 Esp. Cas. 211. S. C.

Coverture.

The defence of *coverture* is, in general, equally unpopular with that of *infancy*; both, it must be confessed, are attempts to avoid paying for that which the defendant has actually received; and, in both cases, must the plaintiff sustain a loss, if he does not receive payment for the commodity with which he has parted. The sense of justice, therefore, natural to the human mind, raises a prejudice against these pleas; but a little reflection will convince every one, that the law which gives them is wise, and beneficial to the public, though the individual may be sometimes injured by it. As the infant is not possessed of discretion to know what is beneficial for him or otherwise, so the married woman has neither property nor freedom wherewith to contract; both are equally under the dominion of her husband, and therefore the law prevents her from being accountable for her contracts. The evidence on this plea of course lies on the defendant. She must prove her marriage, which is generally done by an examined copy of the register, and proof of her identity, or by the evidence of some person present at the marriage; she must also prove that

Part II. *Coverture.*

her husband was living at the time the debt was contracted. This is the ordinary evidence; but in one case[1], where a lady was married in France, and the troubles in that country rendered it almost impossible to get any person as a witness, who was present at the marriage, Lord *Kenyon* held, that proof of her and her husband having been received as husband and wife by all her friends and relations here, was sufficient to support this plea, without calling any person who was present at the marriage. To this plea, the plaintiff may also reply, that the husband at the time of the contract had abjured the realm, or was transported[2]; and where a French emigrant had left his wife in this country, and was himself resident in another, Lord *Kenyon*, at *Nisi Prius*, held, that this circumstance was tantamount to the state of banishment in a native, and that the wife was answerable as a *feme sole*[3]. So if the wife of a foreigner, who is resident abroad, live here and trade as a *feme sole*, she may be sued[4] as such. And in all cases[5] where the husband has been abroad above seven years, it will be incumbent on the defendant to prove that he was alive within that time. It had been determined by some modern cases[6], that if a wife, parted from her husband, with a separate maintenance, secured to her by deed, contracted debts, she might be sued on such contract: but in a late case, where the subject was fully considered, the old rule of law was re-established; and it is now settled, that no agreement between a man and his wife can so far remove the legal disabilities of the latter, as to make her contract binding[7]; and so absolutely void is this contract, that no promise made, after the death of the husband, can give validity to it[8], so as to maintain an action on the original promise; though, if such original promise

[263]

[1] Leader *v.* Barry, M. S. 1 Esp. 353. S. C.

[2] 1 T. Rep. 8, 9.

[3] Walford *v.* Duchess de Pienne, M. S. 2 Esp. 554. S. C.

[4] De Gaillon *v.* L'Aigle, 1 B. & P. 357.

[5] Hopewell *v.* De Pinna, 2 Campb. 113.

[6] Corbet *v.* Poelnitz, 1 T. Rep. 5, &c.

[7] Marshall *v.* Rutton, 8 T. Rep. 545.

[8] Lloyd *v.* Lee, 1 Stra. 94.

promise were founded on such a consideration as imposed a moral obligation on her to perform it, it will be sufficient to support a count on the new promise made after the death of the husband [1].

Ch. II. s. 3. *Coverture.*

[1] Lee *v.* Muggeridge, 5 Taunt. 36.

CHAP. III.

[264]

OF THE EVIDENCE IN ACTIONS OF COVENANT.

Ch. III. *Non est factum.*

THE form of pleading in *covenant*, not allowing that latitude to a defendant which he is entitled to in the action of *assumpsit*, the evidence which the plaintiff is called upon to give is more easily ascertained than in that form of action; for as the law has given no *general issue* in this action, which, when several facts are stated, denies the whole of the plaintiff's case; and as we have before seen that facts which are not expressly denied are considered as admitted; it follows that, unless in the case of several pleas under the statute of Anne, the evidence of the plaintiff is generally confined to a single fact.

The most common plea in the action of covenant is that of *non est factum*, whereby the defendant denies that the instrument, on which the action is founded, is his deed. On this plea, therefore, the plaintiff will be called upon to prove that the instrument was fairly executed, without fraud, and that the proper legal formalities were complied with; the mode of proving which I have before had occasion to notice.

Ante, 93, (*a*).

The

(*a*) If the plaintiff make profert, he must produce the deed, and cannot, on such a declaration, give evidence of its destruction, except in the case of an enrolment under the statute of Hen. 8, in which case the stat. 10 Ann. c. 18, under certain circumstances makes a copy of the enrolment evidence. *Vide ante*, 128.

In

Part II.
Non est factum.

The defendant, of course, will be entitled, in his turn, to give any evidence which shows that it was not duly executed by him. If it be a forgery; or if he were a lunatic [1]; or intoxicated, and knew not what he did [2]; or, if being blind, or illiterate, the instrument was falsely read to him, it is not considered as his deed: and, therefore, either of these facts may be given in evidence on the part of the defendant. But the circumstance of the deed being founded on an usurious or other corrupt consideration [3]; or that the party was an infant, or under duress at the time [4]; does not so wholly destroy the deed, as to be evidence on this issue. In the case of a married woman, however, her deed being absolutely void, her coverture may be taken advantage of on *non est factum* [5]. In like manner as any improper conduct, at the time of the execution of the instrument, may be given in evidence on this plea, so may any alteration whatever made by the plaintiff, or by another person, in a material part of the deed since; for these avoid the deed, and show that it does not remain so at the time of plea pleaded [6]. So if the seal be broken off, with a view of cancelling the deed, the defendant may avail himself of it on this plea; but if the seal were broken by accident, and the plaintiff prove this fact, it still continues an existing instrument [7]; and, if the alteration has been made after the plea was pleaded, this does not support the plea [8].

[265]

[266]

[1] Yates v. Boon, 2 Str. 1104.

[2] Cole v. Robins, B. N. P. 172.

[3] and [4] Bul. N. P. 172.

[5] Ibid.

[6] Piggot's case, 11 Co. 27.

[7] Vide Bul. N. P. 172.

[8] Michael v. Stockwith, Cro. E. 120.

If the declaration contain different averments, and the defendant only plead *non est factum*, the other facts cannot be controverted; nor will the plaintiff be under any necessity of proving them, further than may be sufficient to ascertain his damages.

In all other cases of loss, destruction or possession of the defendant, the plaintiff must state the circumstance specially in the declaration. *Smith and another* v. *Woodward*, 4 East, 585.

When

When the defendant does not plead *non est factum*, but traverses some other fact mentioned in the declaration, the evidence will be confined to the fact so traversed, and the *onus* will lie on that party who makes the affirmative. Thus, if a landlord sue his tenant, and aver that he ploughed up meadow land, &c. contrary to his covenant, and the tenant traverse this fact, the plaintiff must begin with evidence to prove it; but if the defendant, in an action on a covenant to pay a sum of money, plead that he paid it according to the covenant, the plaintiff is not obliged to give any evidence, but the defendant must prove his plea of payment.

By or against Assignee.

The action of covenant is frequently brought by or against an assignee of a reversion or term, and if the plaintiff have the whole estate, though only in part of the premises in respect of which the covenant was made, he may maintain the action [1].

[1] Campbell v. Lewis, 3 B. & A. 392.

In cases where the assignee is plaintiff, it is necessary for him to set out the title of the original lessor, so as to show a reversion in himself; and though where the original lessor is himself plaintiff, such title is wholly immaterial, and cannot, if set out, be traversed, it is otherwise in the case of his assignee. But though the defendant may traverse the title in this case, yet the plaintiff is not obliged to prove it precisely as laid, if he shows a title of the same kind, and that the lessor had a reversion which is assigned to him, that is sufficient [2]. If the conveyance to the plaintiff be traversed, it will be incumbent on him either to prove the conveyance duly and regularly made, or else a payment of rent to him by the defendant [3] (*b*). But in the case of a defendant

[2] Carwick v. Blagrave, 1 Brod. & Bing. 531.

[3] Doe v. Parker, cor. Lord Kenyon, Stafford Sum. Ass. 1788.

(*b*) The case of *Doe* v. *Parker*, was an *ejectment* brought by the lessor of the plaintiff to put an end to a lease granted by one Mrs. *Parkes* to the defendant for twenty-one years, determinable at the end of fourteen years by Mrs. *Parkes*, or her assigns, on giving

Part II. *Against Assignee.*

defendant who is sued as assignee of a term, it will be sufficient on the part of the plaintiff, to prove that the defendant is in actual possession, or pays the rent. This is, however, only *prima facie* evidence, and does not estop the defendant from showing that the title is in another, under whom he holds; and therefore, in one case, where a defendant, who was sued as assignee of all the estate of the lessee, traversed that fact, and proved that he was under-tenant only, (a reversion of a day being left in the original lessee), it was holden that the action was not maintainable[1]. In another case lessees for lives granted all their estate to a third person for ninety-nine years, if the lessees should so long live; and here also it was holden, that such grant being no assignment of the freehold, the grantee could not be sued by the original lessor as the assignee of the estate[2]. So in a case[3] at *Nisi Prius*, where the defendant proved that her husband, (the original lessee), by his will left his freehold messuages, and also his personal estate, to two persons, in trust to permit the defendant to receive and take the rents, issues, and profits of his real estate, and the interest of the personal estate during her widowhood; and after her death, or second marriage, in trust to sell, &c. and in case of such marriage to pay her an annuity of 50*l.* and made those persons executors; Mr. J. *Lawrence* held the defendant not chargeable as assignee, although she had always continued in possession of the premises; and in a still later case it was determined, that a devisee of the mere equity of redemp-

[1] Holford *v.* Hatch, Dougl. 138. See also Hare *v.* Cator, Cowp. 766.

[2] Earl of Derby *v.* Taylor, 1 East, 502.

[3] Averill *v.* Holmes, Worcester Sum. Ass. 1805.

giving six months previous notice to quit. The lease being put in, and a notice by the lessor of the plaintiff being proved, it was objected by the defendant's counsel, that the lessor of the plaintiff should produce some deed of assignment from Mrs. *Parkes*. But it appearing that the defendant had paid rent to him, Lord *Kenyon* said, that was sufficient evidence of an assignment, and of the defendant being his tenant. *Vide ante*, 25.

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tion of a mortgaged term cannot be so charged in a court of law [1]. Whether a mortgagee taking by way of assignment the whole term, but who never entered into possession of the premises, can be so charged, must be considered as a doubtful question; in one case it was held that he could not [2], and though this decision has been doubted by the highest authority [3], it has never been expressly over-ruled [4]. Assignees of a bankrupt cannot be charged as assignees of a term which was in him, merely upon the commissioner's assignment to them [5]. To support an action against them as such, it must also be proved that they accepted the assignment of the premises, and possessed themselves of them. Merely putting the premises up to auction, for the purpose of ascertaining their value, is not such an exercise of right as will make them liable to the action [6]. But if on being applied to for the key, the assignee answers that he will keep it till the end of the quarter to see if he can let the premises, this act will make him liable as assignee of the term; for though he may refuse it at first, he cannot take it in part, and afterwards reject it when he finds it will not answer [7]. So where on a bankruptcy happening in June, and an assignment being made in July, the assignees actually took possession and continued in possession till march, when they put up the lease, fixtures and stock, but failing to sell the lease, returned the keys to the landlord; it was held, that by these acts they had made themselves liable as assignees of the term [8].

[1] Mayor of Carlisle *v.* Blamire, 8 East, 487.

[2] Easton *v.* Jacques, Dougl. 455.

[3] Walker *v.* Reeves, cited Dougl. 461. Westerdale *v.* Dale, 7 T. Rep. 312; Stone *v.* Evans, M. S. also cited 7 East, 341.

[4] Vide 8 East, 497.

[5] Bourdillon *v.* Dalton, Peake's Cas. 238.

[6] Turner *v.* Richardson, 7 East, 335.

[7] Broome *v.* Robinson, cor. Kenyon, C. J. at N. P. cited Ibid. 339.

[8] Hanson *v.* Stevenson, 1 B. & A. 303.

CHAP. IV.

OF THE EVIDENCE IN THE ACTION OF DEBT.

SECTION I.

On Specialties.

Part II. *Non est factum.*

THE action of *debt* is founded either on contract, or on a duty raised by operation of law. The former may be either by specialty, or on a simple contract. In the case of an action founded wholly on a specialty, little more need be said, than to refer to what has been already observed on the action of *covenant*; for in this case, as in that, the rules of pleading require that some one fact only shall be traversed. The only plea which denies the contract itself, is the same as in that action, viz. the plea of *non est factum*; which in cases of bonds for payment of money, puts the plaintiff on proving nothing more than the existence of the deed. Any thing which goes to avoid it, or to deny any of the other matters stated in the declaration, must be specially pleaded; [269] and therefore, in the case of a bail bond, to which this plea only is pleaded, the plaintiff has only to prove the execution of the bond, and need not prove the writ or assignment by the sheriff. By the rules of the common law, the penalty of a bond, or other instrument, was in all cases considered as the debt, and therefore it was never necessary to give any evidence of the actual damage which the plaintiff had received; but the defendant, if aggrieved, was obliged to apply to a court of equity for relief. The statute of 8 & 9 Will. 3, c. 11, has introduced a more equitable mode of proceeding in cases of bonds

Assessment of damages under stat. 8 & 9 W. 3.

bonds for performance of covenants; and, therefore, in these and all other actions for a penalty, it is now necessary for the plaintiff to suggest the breach complained of on the record, either by specially stating it in his declaration or replication; or where the declaration is general and judgment is given by default, or on demurrer, by suggestion subsequently entered on the roll[1]; and in the two former cases, if only one breach be alleged, it is sufficient to state it without saying, "according to the form of the statute[2]." Upon the breach so assigned or suggested, the jury find the actual damage sustained by reason of the breach, as well as the nominal damages by reason of the detention of the debt. To enable them to do this, the plaintiff must be prepared with evidence to prove the extent of his injury, the same as if he had brought an action of *assumpsit* or covenant; and where the condition does not appear on the declaration, or in the pleadings, but is only suggested after judgment, he must also give some evidence of the bond to show that the condition is as suggested; but it will be sufficient for this purpose if the plaintiff's attorney swears that the bond produced is the instrument delivered to him to bring the action, and that he knows of no other of the same date; without calling the subscribing witness[3].

[1] Rolles *v.* Rosewell, 5 T. Rep. 538. Hardy *v.* Bern, Ib. 540. Etherney *v.* Jackson, 8 T. Rep. 255.

[2] Toombs *v.* Painter, 13 East, 1.

[3] Hodgkinson *v.* Marsden, M.S. 2 Campb. 121. S. C.

In actions founded on record, if the defendant deny the record, it must be by plea of *nul tiel record*, the mode of proof in which case has been before noticed. Ante, 30.

Plea of Payment.

The statute of limitations not having provided for the case of actions on specialties, cannot be pleaded in bar of any action founded on them; but if the obligee of a bond, or other creditor by specialty, lie by a long time without claiming his debt, payment will be presumed. This payment should be pleaded as having been made after the day, as well

[270]

Part II. *Plea of Payment.*

as at the day, for the proof of any interest being paid, or other act of the defendant, confirming the instrument, after the day of payment mentioned in the condition of a bond, would preclude the defendant from any such advantage on the plea of *solvit ad diem*, though ever so long a time had elapsed since such payment [1]. In cases where the presumption arises, instead of the defendant being called on to prove his affirmative allegation of payment, the *onus* will lie on the plaintiff to rebut the presumption. The nature of this presumption, and the kind of proof sufficient to repel it, has already been spoken of in its proper place.

[1] Moreland v. Bennet, 1 Stra. 652.

Ante, 28.

SECTION II.

On Simple Contracts.

Ch. IV. s. 2. *Nil debet.*

To actions of debt founded on the *simple contract* of the party, or where a specialty or record is not the gist of, but only inducement to the action [2]; as in an action against a sheriff for an escape; or for rent on an indenture [3]; or against an executor on a *devastavit* [4]; and in like manner in cases founded on a duty raised by operation of law, the rules of pleading allow a much more general defence, namely, the general issue of *nil debet*. This, like the plea of *non assumpsit*, puts the whole of the case in issue, makes it incumbent on the plaintiff to prove every thing which he was obliged to state in his declaration, and enables the defendant, on his part, to prove any thing which shows the plaintiff has no demand on him. It has been held in some cases [5], that a defendant may avail himself of the statute of limitations on this plea; but the modern practice has been to plead the statute specially; and if the question

[2] Warren v. Corset, 2 Lord Raym. 589. [271]

[3] Hardr. 332. Warner v. Theobald, Cowp. 589.

[4] Jones v. Pope, 1 Saund. 39. Bul. N.P. 170.

[5] Lee v. Rogers, 1 Lev. 110. Draper v. Glossop, 1 Ld. Ray. 153. Anon. 1 Salk. 278.

question were to arise, it would most probably be held that such plea was absolutely necessary to enable the defendant to avail himself of the statute: the same reason applies to this case as to the case of *assumpsit*, namely, that notwithstanding the statute, the debt still exists, for the remedy only is barred [1]. On such a plea, the replications and evidence would be the same as in the action of *assumpsit*.

[1] Vide 1 Williams' Saunders, 283, n. (2). Quantock *v.* England, 5 Burr. 2628.

CHAP. V.

[272]

OF THE EVIDENCE IN ACTIONS ON STATUTES.

SECTION I.

On such as are called Penal.

WHERE a certain sum of money, or so much as may be easily rendered certain by calculation, is given by way of penalty for any offence, either to the party injured, or to a common informer, the statute creates a duty, the performance of which may be enforced by the action of *debt*. To this action the defendant may plead either *nil debet*, or *not guilty*, at his election [1]; and on either plea it will be incumbent on the plaintiff to prove that the defendant has committed the acts imputed to him; to prove which, evidence must be adduced of the whole of the affirmative matter mentioned in the declaration. But when the declaration negatives any fact which the defendant alone can be prepared to prove, it seems to be incumbent *on him* to prove the affirmative: for instance, in an action on the game-laws, which prohibit all persons, unless possessed of certain qualifications, from killing game, it is agreed that proof of the defendant having killed game, or attempted to do so, by using a dog, a gun, or other

[1] Vide Coppin, qui tam *v.* Carter, 1 T. Rep. 462. Bul. N. P. 197.

[273]

Part II. *On Penal Statutes.*

engine for that purpose, will be sufficient on the part of the plaintiff, in an action; and the defendant must prove that he is within one of the exceptions which give the qualification. But on the question, whether it was not incumbent on the prosecutor to give general negative evidence on an information *before a magistrate*, the court was, in one case[1], equally divided; and even in *actions* where the negative matter is equally capable of proof by the plaintiff, as in an action for sporting without a certificate, it should seem that the plaintiff should be prepared with evidence to prove a search at the proper office nearest the defendant's residence, where, according to the provisions of the act, such a certificate would be granted, and that no such certificate was entered there; for though the general rule is, that the affirmative only need be proved, yet we had very early occasion to observe that, where a man is charged with a trangression of the law, and it is in the power of the other party to prove the negative, the rule admits of an exception. I must, however, here observe, that in those actions for sporting without a certificate, which have fallen within my experience, no such evidence has been required.

[1] Vide Rex v. Stone, 1 East, 639.

Ante, 5.

The defendant may also avail himself on the general issue, of the suit not having been commenced in due time, which, by statute 31 Eliz. c. 5, s. 5, is limited to two years, in cases where the forfeiture is given wholly to the king; and to one year, where given to the king and the informer jointly; in all cases where the statute creating the offence has not fixed some other period of limitation. In cases, therefore, where it does not appear on the face of the record itself, that the suit was commenced within the limited time, the plaintiff should be prepared with the writ, which he may produce at any time during

[274]

during the trial[1], to show the exact day when the action was commenced. If the defendant were not served with the first writ, and an *alias* has issued, it must appear that the first writ was returned, even though the declaration were filed within a year after the issuing of the first; otherwise the second is no regular continuance of it[2]; but if the first writ appear to have been returned, and the return duly entered on record, continuances may be entered at any time afterwards[3]. Where only one writ has issued, and the declaration is filed within a year afterwards, it is not necessary to show the writ returned[4], or otherwise connect it with the declaration, even though the writ was not *qui tam*[5].

The evidence on the part of the defendant, when the general issue is pleaded, can be only such as tends to contradict that given on the part of the plaintiff, or to show a reasonable excuse. In actions on the game laws, for instance, courts will not try the right to a manor; and if the person who appointed the defendant his gamekeeper has only a colourable title, it will not be permitted to charge him in such action[6]; but if he has not any ground of claim, the mere circumstance of his appointing the defendant, will form no excuse[7]; and the plaintiff, in answer to a mere pretended title, may, on his part, prove the real title, and the commencement of the encroachment under which the defendant was appointed, for the purpose of showing that it was wholly without colour or foundation[8]. As to the proof of qualification by estate, if the defendant prove himself to be in possession of land of the value of 100*l.* per annum, the presumption is, that he is entire owner, until the contrary be proved by showing that he only rents it, or that it is affected with incumbrances reducing its value below that sum[9]. A claim made by the defendant before commissioners

[1] Maugham q. tam *v.* Walker, Peake's Cases, 163.

[2] Harris *v.* Woolford, 6 T. Rep. 617. Stanway *v.* Perry, 2 Bos. & Pul. 158.

[3] Bates *v.* Jenkinson, cited 6 T. Rep. 618.

[4] Parsons *v.* King, 7 Term Rep. 6.

[5] Hutchins *v.* Piper, 4 Taunt. 585.

[6] Calcraft *v.* Gibbs, 4 T. Rep. 681.

[7] S. C. 5 T. Rep. 19.

[8] Hunt *v.* Andrews, 3 B. & A. 341.

[275]

[9] Wetherall *v.* Hall, Cald. 230.

Part II. *On Penal Statutes.*

missioners of income, of an allowance by reason of charges affecting the land, is sufficient evidence of its not being of greater annual value than that stated by the defendant [1]. If the defendant admit his guilt, but mean to set up a former conviction, he must plead it specially [2]; and if the plaintiff reply *nul tiel record* to the plea of conviction, it makes an issue in law, and the defendant must be prepared to prove it to the court, as in other cases of record; but if *per fraudem* be replied, this will be tried by a jury, and the *onus* will lie on the plaintiff.

[1] Rex v. Clarke, 8 T. Rep. 220.

[2] Bredon v. Harman, 2 Stra. 701.

SECTION II.

On Remedial Statutes.

Sect. 2. *On Remedial Statutes.*

ACTIONS by the party grieved, on a statute made for his protection, or the better enforcing his rights, are not considered in the light of penal actions, and are therefore much more favoured in a court of justice. They are not within the stat. of Eliz. as to time [3].

[3] Vide Carth. 282. 1 Show. 354.

The actions founded on statutes of this description are very numerous. I shall, however, in this place, only notice those against a tenant who holds over after a notice to quit; and against a hundred for recompense to the party injured by a felony; as being the most usual. The action for subtraction of tithes will be more properly treated of in another chapter; and that against a sheriff for selling without paying the landlord's rent, when we come to treat of actions against that officer.

[276]

Action by Landlord for double Rent.

1. The actions for additional rent, are given by the statutes of 4 Geo. 2, c. 28, and 11 Geo. 2, c. 19. The former of these statutes relates to notices given by *landlords*, the other to notices given by *tenants*.

In

Ch. V. s. 2. *Action by Landlord for double Rent.*

In the first case the statute gives double the *yearly value* against the tenant who holds over; in the other, *double rent* only is recoverable There are several other differences between the provisions of these two acts of parliament. The double of the *yearly value* given by the first can only be recovered by action: whereas the *double rent* given by the other may also be recovered by distress. The notice by the landlord must be in *writing*[1]; that by the tenant may be by *parol*[2]. In actions founded on the statute 4 Geo. 2, where notice has been given by the landlord, the plaintiff must prove that the defendant held under him, by showing the taking, or payment of rent, having given him notice to produce his receipts; and to entitle himself to double the yearly value from the expiration of the term, he must prove that a notice signed by himself, or some other person duly authorized, was given to the defendant previous to the expiration of the term, to quit at the end of it[3]. But if the tenant having continued to the end of the term, without any notice, afterwards hold over, the landlord may still, provided he has not done any act to acknowledge the continuation of the tenancy, give notice to the tenant to deliver up the possession, or pay double the yearly value[4], in which case the tenant will be liable to double value from the time of the notice. By this act, however, the landlord waves his right to any rent whatever during the time which the defendant has held over previous to the notice, for he cannot consider the defendant as a legal tenant during any part of the time after the end of the term, and a tortious holder afterwards[5]. The defendant being considered by this action as a tortious holder[6], and not a tenant holding under an increased rent, it follows that no objection can be made to the action on account of the plaintiff having recovered in an ejectment, on a demise laid

[1] Wilkinson *v.* Colley, 5 Bur. 2694.

[2] Timmins *v.* Rowlison, 3 Bur. 1603.

[3] Cutting *v.* Derby, 2 Black. 1075.

[4] Cobb *v.* Stokes, 8 East, 358.

[5] Ibid.

[6] Soulsby *v.* Neving, 9 East, 310.

Part II.

Action by Landlord for double Rent.

laid previous to the time of the holding over. In the case of a tenancy from year to year, it must be proved that six months notice was given to quit at the end of the year. As to what persons shall be considered as authorized to give such notice, it has been held that a receiver, appointed by the Court of Chancery, may give the notice in his own name, and bring the action in the name of the person who has the legal estate [1]; and that if any common agent give the notice, his principal may confirm it by a subsequent recognition, though he had given no previous orders on the subject [2]. And tenant in common may alone give notice to quit *his moiety*, and maintain an action for double the yearly value *thereof* [3]; but if there are several joint-tenants, all ought to join in giving the notice [4]. The plaintiff must then prove the yearly value of the premises, of which the rent actually reserved is in ordinary cases considered as the measure; and also the time during which the defendant held over after the day on which he ought to have quitted. He is not obliged to prove any other demand of possession previous to the bringing the action, besides the notice; nor need he prove that any person attended at the appointed time to receive the possession from the defendant [5].

[1] Wilkinson *v.* Colley, 5 Burr. 2694.

[2] Goodtitle dem. King *v.* Woodward, 3 B. & A. 689.

[3] Cutting *v.* Derby, 2 Blac. 1075.

[4] Right dem. Fisher *v.* Cuthell, 5 East, 491. Vide post [320.]

[5] Wilkinson *v.* Colley, ubi sup.

This action being founded on the wilful misconduct of the defendant, cannot be maintained where he has held over under a fair claim of title, though such claim has been unsuccessful; and therefore where a tenant for life, with a power of leasing at the best rent, demised to a person already in possession, in consideration of a surrender of his lease, and the remainder-man afterwards disputed the validity of the lease on the ground of the best rent not being reserved, the jury finding that there was no fraud or collusion by the defendant [6], the court held he could not be charged with double the yearly value for the time

[6] Wright *v.* Smith, 5 Esp. Cas. 203.

time during which he held over, while defending the ejectment which was brought to try the validity of the lease.

Ch. V. s. 2. *Action on the Statute of Hue and Cry.*

1. The first statute which gave an action against a hundred, was that of Winchester 2d, 13 Edw. 1, commonly called the Statute of Hue and Cry. By this statute a party robbed might, in case the hundred did not apprehend the felon within forty days, recover the amount of his loss from them. By stat. 8 Geo. 2, c. 16, the time is extended to forty days after notice in the gazette, as thereby required; and it has been holden that where the declaration averred that the felon had not been yet taken, the apprehension of any one of the felons before the commencement of the action was a good defence[1]. Various provisions have been added from time to time by several later statutes; and as the law now stands, the plaintiff, to sustain his action, must prove the following facts:—

[1] Baskerville v. Hund. of Agbridge, 1 Sid. 11. [278]

1st. That he was robbed in the day-time[2]; that is, when there was day-light enough to see a man's face. It is said in some of the cases, that the robbery must be in a highway; but this does not appear to be necessary[3], so as it is in an open place, and not in a dwelling-house[4]. That the place where the robbery was committed is within the hundred sued; though a variance from the parish named in the declaration is not material[5]. It must also be proved, either that the robbery was on a working day; or that, if on Sunday, the plaintiff was going to church; for by the statute 29 Car. 2, c. 7, a man *travelling* on a Sunday is taken out of the protection of the act[6].

[2] Ashpole's case, 7 Co. 6.

[3] Cooper v. Hundred of Basingstoke, 2 Ld. Ray. 826.

[4] Sendil's case, 7 Co. 6, a.

[5] Shrewsbury v. Hund. of Ashton, 2 Leon. 174.

[6] Tashmaker v. Hundred of Edmonton, 1 Stra. 406.

2d. That the plaintiff, as soon after the robbery as he conveniently could, gave notice to some of the inhabitants of some town, village, or hamlet, near to the place where the robbery was committed[7]. It is not necessary that the notice should have been given to the inhabitants of the nearest village[8]; but it will be

[7] Required by stat. 27 Eliz. c. 13, s. 11.

[8] Noy, 52.

Part II. *Action on the Statute of Hue and Cry.*

be sufficient if it is given at the next village lying in the great road, though there is one nearer, lying out of it. Neither need the village at which the notice is given be in the same hundred or county [1].

[1] Tutter v. Inhabitants of Dacorum, Cro. Car. 41. B. N. P. 184.

3d. That, with as much convenient speed as might be after the robbery, he also gave notice of it to one of the constables of the hundred, or to some constable, borsholder, headborough, or tithing-man of some town, parish, village, hamlet, or tithing, near unto the place wherein the robbery happened; or that he left notice in writing of the robbery at the house of such constable, &c. describing in such notice so given or left, as far as the nature and circumstances of the case would admit, the felon or felons, and the time and place of the robbery [2]. The plaintiff was robbed soon after six in the morning, about two miles and a half from Northampton, and the highwayman, to prevent his pursuit, cut his bridle and stirrups, threw them into a ditch, and turned his horse loose; the plaintiff recovered them, remounted his horse, and rode through a village without giving any notice to the inhabitants; but meeting three men on his return to Northampton, he informed them of the robbery, and arrived at Northampton at seven o'clock. He gave notice to an innkeeper there, and from thence went to a place three miles off, where the high constable resided, and between eight and nine gave notice to him. This was held to be good notice, for the high constable was the most proper person to apply to, and it was not required that he should go to the next constable [3].

[279]

[2] Required by stat. 8 G. 2, c. 16, s. 1.

[3] Ball v. Hundred of Wymersley, 2 Stra. 1170. Bul. N. P. 185, S. C.

4th. The plaintiff must next prove, that, within twenty days next after the robbery, he caused a notice to be given in the London Gazette, describing, as far as the nature and circumstances of the case would admit, the felon or felons, and the time and place of the robbery, together with the goods and effects

Required by same stat.

effects whereof he was robbed. To prove this the gazette itself should be produced; and the notice should contain every material description of the robber. In one case, where the highwayman had red eye-brows, and that circumstance was omitted in the gazette, the omission of so distinguishing a mark was held to be fatal[1]. The notice must also contain a full and true description of the effects whereof the party was robbed, as far as they can possibly be ascertained; as if a man be robbed of bank-notes, of which he knows the dates and numbers, or could by inquiry or diligent search inform himself of those particulars, he ought to particularize them all; and in a case where a man being robbed of his watch, money, and several bank-notes, the numbers of some of which being known to him, and the others not, he neglected to give a further description of any than the value, the Court of Common Pleas were equally divided on the question whether he could recover any part of his loss. *Willes*, Ch. J. and *Burney*, J. held he could not; but *Abney* and *Birch*, J. were of opinion, that he was entitled to recover the value of those whereof he did not know the numbers and dates, and also his watch and money, which were sufficiently described[2].

[280]

[1] Whitworth *v.* Hundred of Grimshoe, 2 Wils. 113.

[2] Chandler *v.* Hundred of Sunning, Barnes, 485. Bul. N. P. 186, S. C.

5th. It is required by the statute of Eliz. that the party robbed shall, within twenty days next before the commencement of the action, be examined upon oath before some justice of the peace of the county wherein the robbery was committed, inhabiting within the hundred where the robbery was committed, or *near* the same, whether he knows the robbers, or any of them; and if upon such examination it be confessed, that he knows the robbers, or any of them, that then he should enter into a bond by recognizance befor the same justice, effectually to prosecute the robbers known. To prove this fact the plaintiff should produce the affidavit made before the justice; and it has been

27 Eliz. c. 13, s. 11.

[281]

Part II. *Action on the Statute of Hue and Cry.*

been holden, that if the person who took it be proved to act as a justice, and it was delivered by his clerk to the person producing it, that is sufficient, without proving the justice's hand-writing[1]; and if the person before whom it is sworn be a magistrate, it is sufficient, though he were out of the county at the time of administering the oath[2]. If no examination were taken in writing, the magistrate may be called as a witness, and depose to the substance of the usual affidavit[3]; and, as to the residence of the magistrate, *Abney, J.* held, that where the affidavit was taken before one who lived twenty miles from the place where the robbery was committed, and many justices lived nearer, yet it was sufficient, as the act was only directory in this respect[4]. This oath must be taken by the person actually robbed, either master or servant[5]; and if two servants, or the servant and a stranger, to whom he delivered part of the money, are robbed at the same time, both should take the oath, in order to enable the *master* to maintain the action for the whole; for if only one be examined, the master can only recover so much as was taken from him[6]; but if the *servant* bring the action in his own name, on a robbery so committed on himself and another person, to whom he had delivered part of the money, it is sufficient for him alone to have made the affidavit, because the whole money is constructively in his possession[7]; and on the same principle, where master and servant are travelling together, and the master having delivered part of his money to the servant, they are both robbed, the master alone may make the affidavit[8].

In order to make out the fact, that the oath was so taken within twenty days next before the commencement of the action, the original writ should also be produced.

Lastly, it must be proved, that before the commencement

[1] Per Parker, Ch. J. at Hertford, 1712. Bul. N. P. 186.

[2] Halier *v.* Hundred of Benhurst, Sir W. Jones, 239. Cro. Car. 211, S. C.

[3] Graham *v.* Hundred of Beacontree, B. N. P. 186.

[4] Lake *v.* Hund. of Croydon, 1744. Bul. N. P. 186.

[5] Green's case, Cro. Eliz. 142.

[282]

[6] Ashcomb *v.* Hund. of Spelhorne, 1 Show. 94, 241. Salk. 613, S. C.

[7] Ashcomb *v.* Hund. of Elthorn, S. C. Carth. 145.

[8] Jones *v.* Hund. of Bromley, and Bird *v.* Hund. of Ossulston, cited Carth. 146 and 7. Required by 8 G. 2, c. 16.

Action on the Statute of Hue and Cry.

mencement of the action, the plaintiff went before either the chief clerk or secondary; the filazer of the county wherein the robbery was committed; the clerk of the pleas of the court wherein the action is commenced, or their respective deputies; or before the sheriff of the county wherein the robbery was committed; and entered into a bond, to the high-constable of the hundred, in the penal sum of 100 *l.* with two sureties, approved of by those officers respectively, conditioned for payment of the costs, in case of his failure in the action. This bond must be produced, and one of the subscribing witnesses called to prove it. The statute of 27 Eliz. having required that the action should be commenced within a year, the production of the writ is in some cases necessary to prove this fact also; and if the writ be tested within that time, that is sufficient, though it has not passed the great seal till afterwards.

[283]

Price *v.* Hundred of Chewton, 1 P. W. 437.

As to the circumstances of the robbery, we have before had occasion to observe, that the plaintiff himself may, in some cases, be a witness; but by a late act of parliament, made in consequence of the suspicious circumstances attending the case of *Chandler v. the Hundred of Sunning*, before cited, it is enacted, that no person shall recover more than the value of 200 *l.* unless the person or persons robbed shall at the time of the robbery be together in company, and be in number two at the least, to attest the truth of the robbery.

Ante, 146.

22 G. 2, c. 24.

Actions on Riot Act.

The Riot Act (1 Geo. 1, st. 2, c. 5.) gives an action against any two inhabitants of the hundred to recover the value of certain buildings injured by rioters. Many cases had arisen on this statute, which not only confined the operation of it within very narrow bounds, but also made the construction uncertain, by reason of the degree of criminality in the rioters being a matter of consideration with the jury. Thus it

Part II. *Action on the Statute of Hue and Cry.*

it was held, that unless the beginning to demolish or pulled down the house amounted to a felony in the rioters, the hundred was not liable[1]; and as that must depend on their intention, this was always a disputed question. To remedy these defects the stat. 57 Geo. 3, c. 19, was passed, whereby it was enacted, (sec. 38th), That "in every case where any house, shop, or other building whatever, or any part thereof, shall be destroyed, or shall be in any manner damaged or injured, or where any fixtures thereto attached, or any furniture, goods or commodities whatsoever, which shall be therein, shall be destroyed, taken away or damaged, by the act or acts of any riotous or tumultuous assembly of persons, or by the act or acts of any person or persons engaged in or making part of such riotous or tumultuous assembly, the inhabitants of the city or town in which such house, shop or building shall be situate, if such city or town be a county of itself, or is not within any hundred, or otherwise the inhabitants of the hundred in which such damage shall be done, shall be liable to yield full compensation in damages to the person or persons injured or damnified by such destruction, taking away or damage; and such damages may be demanded, sued for, and recovered, by the same means and under the same provisions as are provided in and by an act passed in the first year of King George the First, intituled, 'An Act for preventing tumults and riotous assemblies, and for the speedy and effectually punishing the rioters,' with respect to persons injured and damnified by the demolishing or pulling down any dwelling-house, by persons unlawfully, riotously and tumultuously assembled:" so that now all kinds of buildings are within the protection of the law, and the sufferer is entitled to compensation whether the acts of the rioters amount to a felony or only a misdemeanor,

[1] Reid *v.* Clarke, 7 T. Rep. 496. Burroughs *v.* Wright, Ib. 614.

demeanor. The evidence of course will be merely, the property of the plaintiff; the destruction of it by a riotous mob; and the means by which such destruction was effected. In regard to the extent of compensation, it is confined to the injury arising at the same time as the destruction of the building; and if while doing that, the rioters destroy goods and furniture in the house[1], or damage the garden adjoining[2], the hundred is liable to the extent of such damage. By the statute of Geo. 1, the hundred was not liable for the value of property stolen or taken away[3]; but this is also remedied by the express words of the other act of parliament. The Black Act (9 Geo. 1, c. 22,) gives a similar action for damage to the amount of 200 *l.* (*a*) done by persons maliciously killing or maiming cattle, cutting down trees, setting fire to houses, &c. The 8 Geo. 2, c. 20, for the destruction of turnpikes and works in navigable rivers; 10 Geo. 2, c. 32, for hop-binds maliciously cut; and the act 11 Geo. 2, c. 22, for corn destroyed to prevent exportation: but as the evidence is not very complex in any of these cases, it is unnecessary to say more respecting them.

[1] Hyde *v.* Cogan, Dougl. 699.

[2] Wilmot *v.* Horton, Doug. 701, n.

[3] Beckwith *v.* Wood, 1 B. & A. 487.

[284]

(*a*) In a case arising on this statute, where a barn belonging to *A.* in the occupation of *B.* had been burnt, and corn belonging to *B.* therein also destroyed, Mr. B. *Thomson* held that both landlord and tenant were entitled to recompense to the amount of 200 *l.* each; and that an oath made by the servant of the tenant was sufficient for both. *Adderley* v. *Hundred of Offlow North*, Stafford Spring Assizes, 1802. But in a case arising on the statute 52 G. 3, c. 130, where an action was brought by several partners for an injury done to their buildings, and all the parties were present at the time, the Court of K. B. held, that all must join in the affidavit. *Nesham* v. *Armstrong*, 1 B. & A. 146. And in another case, arising on the statute 9 Geo. 1, it was holden that the affidavit must state, where the injury was done by several, that the deponent does not know them, "or either of them." *Thurtel* v. *Hundred of Mulford*, 3 East, 400.

CHAP. VI.

OF THE EVIDENCE IN ACTIONS UPON THE CASE.

Part II. *General Observations.*

UNDER this head might have been included the action of *assumpsit*; but having before had occasion to mention, at considerable length, the evidence required in that form of action, I shall confine the present chapter to those actions which are founded on *torts*; and which are generally understood to be intended, when an action is said to be *on the case*.

Some of these are founded in *malice*, as actions for *slander* and *malicious prosecutions*; others in *negligence*, as where a man, having a right to use his own property, exercises his right so carelessly as to injure his neighbour; and a third class, on the direct invasion of incorporeal property.

In all these cases, the plaintiff is obliged to state the whole substance of his case in the declaration; and as he can only recover on the justice and conscience of it, whatever will in equity and conscience, according to the circumstances of the case, bar the plaintiff's recovery, may be given in evidence by the defendant, on the *general issue* [1], which is merely that he is *not guilty* of the premises wherewith he is charged. But in cases where the party justifies an act which is *prima facie* illegal, as the slander of another; or where an injury has in fact been committed, and there is no defence, but that of the remedy being barred by the statute of limitations; the defence must be specially pleaded.

[285]

[1] Vide 3 Burr. 1353.

On the plea of the *general issue*, the plaintiff must be prepared with evidence of all the facts stated in his declaration; and if the defendant plead the statute of limitations, the plaintiff must prove that the original cause

cause of action accrued within the time of limitation, for this action cannot be revived as in the case of *assumpsit* or debt, founded on an executed consideration.

Ch. VI. *General Observations.*

SECTION I.

Actions founded in Malice or Fraud.

Sect. 1. *Slander.*

In *slander*, the plaintiff must prove all such material allegations, contained in his declaration, as are not implied by the words themselves. As where words spoken of a physician charge him with being a quack, and the plaintiff alleges that he had taken the degree of Doctor of Physic, it will be incumbent on him to give regular evidence of such degree [1]. But where the words spoken of an attorney [2], or physician [3], imply an admission by the defendant that the plaintiff was entitled to act in those characters, and charge him with negligence or misconduct in the practice of them, it is sufficient to give general evidence of his having practised in the profession. In the last case, however, it should be observed [4], that though the plaintiff had been called in as a physician to prescribe for a person on whom the defendant attended as apothecary, and the defendant, speaking of his prescription, said, "Dr. S——," the judges of the Common Pleas were equally divided on the question, whether it was necessary for the plaintiff to give further evidence of his being a physician than his having practised as such; so that before such evidence is dispensed with, it ought clearly to appear that the defendant treated the plaintiff as a person qualified to act.

[1] Moises *v.* Thornton, 8 T. Rep. 303.

[2] Berryman *v.* Wise, 4 T. Rep. 366.

[3] Smith *v.* Taylor, 1 New Rep. 196.

[4] Vide Wogan *v.* Somerville, 7 Taunt. 401; and stat. 55 Geo. 3, c. 194, as to apothecaries.

The plaintiff must next prove that the words laid in the declaration, or at least as to some of them [5], were spoken by the defendant: for words spoken in the third

[5] Compagnon *v.* Martin, 2 Black. 790.

Part II. *Slander.*

[286]

third person will not support a declaration for words spoken in the second[1]; nor words spoken by way of interrogation a charge of words spoken affirmatively[2]. But having proved the words laid in the declaration, he may also give in evidence other words not therein stated to show the malignity of the defendant, although such other words are themselves sufficient to be the foundation of an action[3]. Where special damage is the gist of the action, that also must be proved, and must appear to have been the legal and natural consequence of the slander; for the wrongful act of a third person, as that he dismissed the plaintiff from his employ before the end of the term for which they had contracted, will not support the action, though such dismission was in fact induced by the slander[4]. But though the special damage must be proved as laid where it is necessary to maintain the action, yet the mere statement of special damages, in a case of words actionable in themselves, does not make it necessary for the plaintiff to prove that he has in fact sustained such damage[5].

If a *libel* be the injury complained of, the publication must be shown, either by proof that the defendant wrote and published it; or that, being a bookseller, it was sold in his shop, by himself or his servant[6]; or, in case of a newspaper, that the paper was published to the world in the ordinary way[7], and that the defendant is the printer, editor, or proprietor of it; which may be shown by evidence that he gave a bond to the stamp office for payment of the duties, and had occasionally applied there on the subject[8]. And now by stat. 38 Geo. 3, c. 78, it is enacted (sect. 1.) That no person shall publish a newspaper until affidavit or affirmation shall be made and delivered to the commissioner of stamps (sect. 2.) specifying the names, additions, descriptions and places of abode of all

[1] Vide Rex v. Berry, 4 T. Rep. 217.

[2] Barnes v. Holloway, 1 T. Rep. 150.

[3] Rustil v. Maquister, 1 Campb. 49. Lee v. Huson, Peake Cas. 166. Scot v. Lord Oxford and Wife, cor. Lawrence, J. Heref. Sum. Ass. 1808. Sed vide Mead v. Daubigny, Peake's Cas. 125, cont.

[4] Vicars v. Wilcocks, 8 East, 1.

[5] Guest v. Lloyd, Bul. N. P. 6.

[6] Rex v. Almon, 5 Burr. 2686.

[7] Rex v. Pearce, Peake's Cas. 75.

[8] Rex v. Topham, 4 T. Rep. 126.

all and every person and persons who are intended to be printer and printers, publisher and publishers thereof, if the number of proprietors, exclusive of the printer and publisher, shall not exceed two, and in case the same shall exceed that number, then of two such proprietors exclusive of such printer and publisher, and a true description of the house or building wherein any such paper is intended to be printed, and likewise the title of such paper. The statute then (sect. 9.) proceeds to enact, that those affidavits, &c. or copies thereof, certified to be true copies as after-mentioned, that is (sect. 14.) under the hand or hands of one or more of the commissioners or officers in whose possession the same shall be, (which handwriting must be proved, though that they are such commissioners need not), shall in all proceedings, civil and criminal, touching any newspaper mentioned in such affidavit, &c. be received and admitted as *conclusive* evidence of the truth of all matters set forth in such affidavit, &c. as are thereby required to be therein set forth, and shall be received in like manner as *sufficient* evidence of the truth of all such matters against all and every persons and person who shall not have signed, sworn or affirmed the same, but who shall therein be mentioned as proprietor, &c. unless the contrary be satisfactorily proved; provided, that if any such person shall prove that he has signed, sworn, or affirmed and delivered to the commissioners, or such officers as aforesaid, previous to the day of the date or publication of the paper to which such proceedings relate, an affidavit or affirmation that he has ceased to be the printer, such person shall not be deemed, by reason of any former affidavit, &c. to have been the printer, &c. after the delivery of such affidavit, &c.

Having made these provisions in regard to the proof of such proprietor, &c. the stat. (sect. 10.) enacts, that

Part II. *Slander.*

in some part of every newspaper there shall be printed the true and real name, &c. of the printer and printers, publisher and publishers of the same, and also a true description of the place where the same is printed; and (sect. 11.) that it shall not be necessary after such affidavit, &c. or a certified copy thereof shall be produced in evidence as aforesaid against the persons who signed and made such affidavit, &c. or are therein named according to the act, or any of them, and after a newspaper shall be produced in evidence entitled in the same manner as the newspaper mentioned in such affidavit or copy is entitled, and wherein the name or names of the printer and publisher, and the place of printing mentioned in such affidavit, &c. agree, for the plaintiff or prosecutor to prove that such newspaper was purchased at any house, shop or office belonging to or occupied by the defendant, his servant, &c.

It is also enacted (sect. 12.) that service at such house or place of any such notice shall be deemed good service, with the like proviso as before, when another affidavit of his ceasing to be such printer, &c. shall have been delivered.

The statute has also provided (sect. 17.) that the printer shall, within a certain time, deliver a paper, signed by himself, to the commissioners, which may be produced in evidence, when necessary, upon application at any time within two years.

It has been held, that a paper produced is not only evidence of the publication by the defendant, but also evidence that it was published at the place described by the paper[1]. And, indeed, in the case of a newspaper, which from its very nature is intended for general circulation, proof of that paper being circulated in any county is proof of the publication of the libel there[2].

In cases where the libel is in a foreign language, both

[1] Rex v. Hart, 10 East 94.

[2] Per Bailey, J. in Rex v. Sir F. Burdett, Hilary, 2 Geo. 4.

both the original and translation must be set out in the declaration [1], and in addition to the usual evidence of the libel, the translation must be proved to be correct [2].

The defendant, on the *general issue*, may insist on the whole paper or writing, in which the libel is contained, being read, to explain the parts set out on the record [3]; and may prove that he was an innocent publisher, as that he delivered the paper without knowing the contents [4]; or that the publication is a true report of a trial at law [5] (*a*); or a copy of a report of the House of Commons [6]; or the notification of the sentence of a court martial in the usual form; or the report made by him as president of a military court of inquiry [7] (*b*); or that he was giving a character of a servant [8]; or his opinion of the circumstances of a tradesman [9] to a person who inquired of him; or confidentially expressing his opinion of the conduct of the plaintiff in a particular business in which he and

[1] Zenobio *v.* Axtel, 6 T. Rep. 162.

[2] Rex *v.* Peltier, K. B. Sittings after Hil. 1803.

[3] Rex *v.* Lambert, 2 Campb. 400.

[4] Vide Rex *v.* Almon, supra.

[5] Curry *v.* Walter, 1 Bos. & Pul. 523.

[6] Rex *v.* Wright, [287] 8 T. Rep. 293.

[7] Jekyl *v.* Sir J. Moore, 2 N. R. 341.

[8] Edmonson *v.* Stephenson, Bul. N. P. 8. Weatherston *v.* Hawkins, 1 T. Rep. 110.

[9] Herver *v.* Dowson, B. N. P. 8.

(*a*) In the above case of *Curry* v. *Walter*, the court entertained some doubt whether the defence set up should not have been pleaded specially; and no judgment having been given, that doubt must be considered as still remaining. The Chief Justice *Eyre*, at N. P. thought the general issue sufficient; and the principle upon which the court decided that the action would not lie, and upon which the other cases above cited were determined, strongly supports his lordship's opinion.

The evidence does not go merely to show an excuse, but to prove that there was no malice in the mind of the defendant, and consequently, that the publication is not a libel; so it has been held, that fair and candid observations on public performances (*Dibdin* v. *Swan*, 1 Esp. 28), are not to be considered as libellous: and that in an action for a libel, charging plaintiff, a bookseller, with publishing immoral books, the defendant might, under the general issue, produce such books to show that his own publication was a fair stricture on those of the plaintiff. *Tabart* v. *Tipper*, 1 Camp. 350.

Till the point shall be settled, however, it will always, in such cases, be advisable for the defendant to add a special plea to the general issue.

(*b*) This must be understood on the supposition of the plaintiff being able to give evidence of it; for the report itself could not be produced, nor any office copy of it. *Vide ante*, 90.

Part II. *Slander.*

the person, to whom a letter charged as a libel was addressed, were jointly interested [1], or the like; for such facts show that the communication was confidential, and that there was no malice in his mind. But if it appear that the defendant has made his own and the plaintiff's situation a mere pretence to enable him to injure the plaintiff, and has in reality conducted himself with malice towards him, this will form no defence. And, therefore, where a master having turned away a servant, went to another person with whom the servant formerly lived, told such person of his misconduct, and desired him not to give the servant a character; and then, in answer to an inquiry made by another person to whom the servant offered himself, made a charge of misconduct which he could not prove; and the jury from this circumstance implied malice, and found a verdict for the plaintiff; the court refused to set it aside [2]. So where a member of either house of parliament makes a speech in the house reflecting on an individual, and afterwards publishes such speech, such publication is considered as a libel; for, although what he says in his place is privileged from further inquiry, yet his subsequent act not falling within the regular exercise of his parliamentary duty or privileges, is the same as, and liable to all the consequences of, any other publication [3].

The defendant may also on the general issue prove, in mitigation of damages, that the plaintiff had been in the habit of libelling the defendant [4], or such facts and circumstances as shew a ground of suspicion, not amounting to actual proof of the guilt of the plaintiff [5]; as that he was generally suspected of the crime imputed to him, and on that account avoided by those with whom he had been formerly acquainted [6]; but if he contend that the words or libel are true, then he must plead a special justification [7], the proof of which will lie upon him; and in this case the

[1] M'Dougall *v.* Claridge, 1 Camp. 267.

[2] Rogers *v.* Clifton, 3 Bos. & Pul. 587.

[3] Rex *v.* Lord Abingdon, 1 Esp. Ca. 226. Rex *v.* Creevey 1 M. & S. 273.

[4] Finnerty *v.* Tipper, 3 Campb. 76.

[5] Knobel *v.* Fuller, cor. Eyre, C. J. at N. P. Sit. after Trin. 1797, MS. Appen. [288]

[6] Ld. Leicester *v.* Walter, 2 Campb. 251. —— *v.* Moor, 1 M. & S. 284.

[7] Underwood *v.* Parks, 2 Stra. 1200.

the evidence must be confined to such facts as tend to prove the plaintiff's guilt of the particular offence [1].

In actions for *malicious prosecutions*, the plaintiff must show the prosecution commenced and ended, by proof of an examined copy of the record [2]; or in case the prosecution were by indictment at the sessions for a misdemeanor, the clerk of the peace may attend with the original record [3]; and though in cases of felony, the officer having the custody of records would be guilty of a breach of his duty, and culpable in producing the record, or giving copies without the order of the judge, or fiat of the attorney-general, and would not be compellable to do so, yet if in fact it is produced, the judge cannot reject the evidence for want of such order [4]. The plaintiff must then show that the defendant was the prosecutor of the indictment, by proof that he applied to a magistrate, (to prove which, all the proceedings before him should be produced and proved); or that he was otherwise personally active in the business; and for this purpose one of the grand jury may be called [5]. A person who acted merely as a justice of peace, though his name be on the back of the indictment as prosecutor, is not liable to an action [6]. The plaintiff should also be prepared to prove the falsehood of the charge; and if the bill were found by the grand jury, he must prove that there was not the least cause for the prosecution [7]. This fact of the want of probable cause cannot be inferred from the mere proof of the defendant not having appeared when the indictment was called on, or of his having, after commencing the prosecution, declined to prefer an indictment [8], but some further evidence must be given by the plaintiff before the defendant is called on for his defence [9]; for it must be recollected that the prosecution being founded on the oath of the party, such oath must be taken to be true until the contrary

[1] Snowdon *v.* Smith, cited 1 M. & S. 286.

[2] Clayton *v.* Nelson, Bul. N. P. 13. See also Kirk *v.* French, 1 Esp. N. P. Cas. 81.

[3] Morrison *v.* Kelly, 1 Blac. 385.

[4] Leggatt *v.* Tollervy, 14 East, 308.

[5] Sykes *v.* Dunbar, Selw. N. P. 1004.

[6] Girlington *v.* Pitfield, 1 Vent. 47.

[7] Vide Saville *v.* Roberts, 1 Salk. 14. 1 Lord Ray. 374.

[8] Wallis *v.* Alpine, 1 Camp. 204.

[9] Purcell *v.* Macnamara, 9 East, 361. 1 Camp. 199, and cases there cited.

Part II. *Malicious Prosecutions.*

is proved [1]. Where such oath has not obtained credit, as in cases where the bill was thrown out, it seems formerly to have been considered that the *onus* of proving a probable cause would lie on the defendant [2]; but in the later decisions it has been held, that in this case also the plaintiff must give some evidence of the want of probable cause [3]. Malice is necessary to support the action, but that will be implied from the want of probable cause; whereas the most express malice will not preclude the necessity of proving the want of probable cause where a bill has been found. If it appear from the evidence offered by the plaintiff, or from that produced by the defendant, that there was but a *probable cause* for the prosecution, that is a sufficient defence to the action. To increase the damages, the length of imprisonment, the expences of the plaintiff, and the circumstances of the defendant, are also proper subjects of proof.

[1] Vide ante, 146, note (*m.*)

[2] Incledon *v.* Berry, 1 Camp. 203.

[3] Byne *v.* Moore, 5 Taunt. 187.

[289]

Malicious Arrest.

To support the action for a *malicious arrest*, the plaintiff should prove the affidavit of the defendant, either by production of the original, or proof of an office copy. The former seems to be the best and safest evidence [4]. He must also prove an examined copy of the writ and return; and was required by Lord *Kenyon*, in one case, to produce and prove the sheriff's warrant under which the arrest was made [5], though when the defendant is connected with the writ by the affidavit of debt, this seems hardly necessary. Having then proved the arrest, the plaintiff must next prove that the cause is ended, either by an entry on the record, or at least by a rule of court for discontinuance of the action, and payment of costs under it [6]. An order of a judge for that purpose does not appear to be sufficient [7]. And in like manner, where a commission of bankruptcy was ordered by the chancellor to be superseded, but no writ of supersedeas had issued, Lord *Ellenborough* held

[4] Croke *v.* Dowling, Bul. N. P. 14. See also Webb *v.* Herne, 1 Bos. & Pul. 92.

[5] Lloyd *v.* Harris, Peake's Cas. 174.

[6] Bristow *v.* Hayward, 4 Camp. 214.

[7] Kirk *v.* French, 1 Esp. Cas. 80.

held the order not sufficient proof[1]. In this case also he must prove that the arrest was without reasonable or probable cause; for the mere circumstance of its ultimately appearing that nothing was due on a disputed account is not sufficient; and where the original cause was referred to arbitration, and the arbitrator determined on the examination of the parties, and inspection of their books, Lord *Kenyon* held that the action was not maintainable[2].

Ch. VI. s. 1. *Malicious Arrest.*

[1] Poynton v. Forster, 3 Camp. 60.

[2] Habershon v. Troby, 3 Esp. 38.

Deceit.

As malice, either express or implied, is necessary to support an action for slander, or an unfounded prosecution, so a *fraudulent* intention must be proved to support an action for a *deceit* properly so called. Those actions which are founded on a false representation or concealment of the defects of any commodity, sold by the defendant to the plaintiff, have been before spoken of[3]. They are generally considered as breaches of contract, and where the assertion is unqualified, the action is maintainable, though the defendant himself were mistaken. But where a man, on being applied to for information as to the circumstances of another, and the safety of trusting him, says that he is a man of credit, and one who may safely be trusted; and it afterwards turns out, that the person of whom he so spoke was at that time a man of no property; no action is maintainable on this false assertion, unless it be proved that the defendant knew at the time he made it, that he was giving a false character of the person respecting whom inquiry was made[4]. Even where the defendant, on repeated applications being made to him, said that, *to his own knowledge*[5], the third person was a lady of considerable fortune, and of larger expectations, whereas it turned out that she was a mere swindler; yet as the defendant really believed the representations which she had made to him, and had been himself duped by the appearance she made in the world,

[290]

[3] Ante, 239.

[4] Pasley v. Freeman, 3 T. Rep. 51. Tapp v. Lee, 3 Bos. & Pul. 367.

[5] Haycraft v. Creasy, 2 East, 92.

Part II. *Deceit.*

the action was held not to be maintainable; for the assertion of knowledge, when taken with reference to the credit and circumstances of another, means nothing more than a strong belief founded on reasonable and probable grounds.

SECTION II.

Actions founded in Negligence.

Sect. 2. *Negligence.*

[291]

We had occasion in the last section to observe, that in those cases where a man officiously intermeddles with the character or circumstances of his neighbour, the law implies malice, and that the *onus* is cast on him to prove his innocence; while, on the other hand, when he appears to have acted in the regular course of business, as in answering an inquiry which has been made by a third person, or the like, it is incumbent on the party complaining to give express evidence of malice. The same principle applies to those actions which are founded in negligence. If one man keep a lion, a bear, or any other wild and ferocious animal, and such animal escape from his confinement, and do mischief to another, the owner is liable to make satisfaction for the mischief so done, without further evidence of negligence in him; for every person who keeps such noxious and useless animals must keep them at his peril[1]. On the contrary, if a man has a dog, a bull, or any other domestic animal, such as are usually kept, and are, indeed, necessary to the existence of man; no action is maintainable for any damage done by such animal, without proof that the owner knew that he was accustomed to do mischief; for without such knowledge, no negligence or fault is imputable to the defendant[2]. In this case, therefore, the plaintiff must not only prove the damage

[1] 2 Ld. Raym. 1583.

[2] Ibid. Jenkins v. Turner, Salk. 662. 1 Lord Raym. 109, S. C.

[292]

mage which he has sustained, but he must also prove that the animal had before done mischief, and that the defendant, having knowledge of that fact, permitted him to go about; for merely keeping him in his own yard, for the protection of his premises, in the night, though not chained, will not subject him to an action[1]. But when it is proved that the animal had once done mischief of any kind, and that the owner, after knowledge thereof, permitted him to go at large; he will be answerable for all other damages done by him, though of a different kind from that which he had before committed[2]; and, therefore, where a dog accustomed to worry sheep was permitted to go at large, and afterwards bit a horse, the owner was held to be liable[3]. So, the first fault being in the owner, in permitting the animal to be at large after he knew of his mischievous disposition, he will be equally liable to the action, though, in the particular instance, the party injured has been negligent or imprudent. Thus, where a person trod upon a dog which was lying at the owner's door, and the dog bit him in consequence, yet it being proved, that the owner knew he was accustomed to bite, the action was held to be maintainable[4]. And, in a late case, where a dog having been bitten by one that was mad, the owner fastened him up, and a child coming near him irritated him with a stick, upon which the dog flew at and bit him, in consequence whereof the child had the hydrophobia and died; Lord *Kenyon* held, that the father might maintain an action against the owner for the expences of the apothecary; because it was the duty of the owner to have destroyed the dog immediately that he knew him to be in danger of so fatal a malady, or at least to have kept him in a place where he could not by possibility have done mischief[5].

[1] Brock v. Copeland, 1 Esp. 203.

[2] 12 Mod. 555.

[3] 1 Ld. Raym. 110.

[4] Smith v. Pelah, 2 Stra. 1264.

[293]

[5] Jones v. Perry, MS. 2 Esp. Cas. 482, S. C.

In

Part II. *Negligence.*

In these cases there was great negligence in the defendant, but where an action was brought for an obstruction in the highway, by reason whereof the plaintiff's horse fell and he was hurt, it appearing that the plaintiff was riding with great violence, and might have avoided the obstruction with common prudence, the action was determined to be not maintainable[1]; and in another action of the like nature, where the plaintiff's gig was overturned by reason of his horse taking fright at some rubbish laid in the road by the defendant's workmen, but it appeared that the plaintiff himself managed the horse unskilfully, a similar decision was made by the court[2].

[1] Butterfield v. Forrester, 11 East, 60.

[2] Flower v. Adam, 2 Taunt. 314.

The case of the unruly horse, which, being driven in Lincoln's-inn-fields for the purpose of breaking, got loose and struck the plaintiff, was determined on the same principle; the action was holden to be maintainable, because there was a degree of negligence in attempting to break a young horse in so public a place[3]; but had it not been for this negligence the action could not have been supported; and therefore, if a ship be navigating a public river, or a carriage travelling on a public road, and notwithstanding all due care and attention in the person steering the ship, or driving the carriage, it runs against another and does damage, no action lies against the owner. In these cases, therefore, it is incumbent on the plaintiff to show negligence in the defendant or other person under whose care or conduct his ship or carriage was.

[3] Michel v. Alestree, 2 Lev. 172. 1 Vent. 295, S. C.

Horses and carriages being generally trusted to the care of a servant, the very possession of them by such servant is evidence that they were about the business of the master, and makes him liable to an action for any injury arising by the negligence of his servant[4]. But this is not conclusive upon the defendant,

[4] Ibid.

fendant, for if he prove that the horse or carriage was taken out of the stable by the servant in defiance of his orders to the contrary, this evidence showing that the servant was not then in the due employment of his master, discharges the master from the general liability for the acts of the servant [1]; and in like manner, where a servant, driving his master's carriage, in which no person was, wilfully and maliciously drove against the carriage of another, it was held, that the master was not liable for this wilful act of his servant, as he would have been for any act of negligence or unskilfulness in the regular discharge of his duty [2]; and even where a master of a ship was on board at the time an injury was done to another ship by the wilful misconduct of a sailor, it was held that he was not answerable [3].

[1] Semb. per Buller, J. 3 T. Rep. 762.

[2] M'Manus *v.* Cricket, 1 East, 106.

[3] Bowcher *v.* Noidstrom, 1 Taunt. 568.

SECTION III.

Actions for Disturbance, &c.

In actions for *disturbances* and *nuisances*, the plaintiff must prove his possession of the land or house which has been injured, and carry his evidence of the state and situation of the premises, and the enjoyment of the right, as far back as possible; for in cases where there is no actual grant, usage and prescription must settle the right of the parties.

In general the proof of twenty years undisputed enjoyment of commons, lights, pews, ways, or other easements appurtenant [1] to a house or land, and in some cases a much less time, will be sufficient to raise the presumption of a prescription or grant [2] (*c*); and

[1] Lewis *v.* Price, cor. Wilmot, J. Worcester Sp. Ass. 1761, MS. cited also 2 Will. Saund. 175, a.

[2] Darwin *v.* Upton, 2 Will. Saund. 175, d. and several other cases there cited.

(*c*) In *Bealey* v. *Shaw*, 6 East, 214, Lord *Ellenborough* said, that twenty years exclusive enjoyment of water, in any particular manner, affords a conclusive presumption of right in the party so enjoying

Part II. *Disturbance and Nuisance.*

and if *A.* being possessed of two houses, sell one to *B.* and the other to *C.* one purchaser cannot so alter his

enjoying it. But less than twenty years enjoyment may, or may not, afford such a presumption, according as it is attended with circumstances to support or rebut the right. In that case, the persons under whom the defendants claimed, had eighty years since erected a mill on their lands, and made a weir to divert water to it out of the river *Irwell*, which weir had been at different times before 1787 enlarged, and thereby a greater quantity of water diverted from the river. In 1787 the plaintiff built a mill lower in the stream, which was supplied by the water not then taken by the defendants weir, and the plaintiff continued to enjoy this surplus water until 1791, when the defendants enlarged their weir and made other works on the river, whereby they took all the water from the plaintiff's mill. The court held the action maintainable; and Mr. J. *Le Blanc* said, the true rule is, that if after the erection of works, and the appropriation by the owner of the land of a certain quantity of water flowing over it, the proprietor of other lands takes what remains of the water before unappropriated, the first mentioned owner, however he might before such second appropriation have taken to himself so much more, cannot do so afterwards.

So where a building used as a malt-house, and having lights sufficient for that purpose, was converted into a dwelling-house, and soon afterwards a building was erected which darkened the windows, Lord Chief Baron *Macdonald* left it to the jury whether there was sufficient light for a malt-house, saying, that no man could by his own act suddenly impose a new restriction on his neighbour. *Martin* v. *Goble*, 1 Camp. N. P. Cas. 323.

Another most important case has lately come before the court, on the subject of water. The plaintiff being entitled to a fishery in the river *Ribble*; and the defendant and his predecessors, proprietors of a mill there, having, till within the last forty years, had a brushwood weir across the river, near their mill, at which weir they had for two hundred years past exercised the right of taking the fish; in the year 1766, the then owner of the mill erected a a solid stone weir two thirds across the river, in lieu of the former brushwood, leaving the other third of the weir composed of the same materials as before. No objection was made to this alteration, and the weir continued in that state till 1784, when the remainder of the brushwood was removed by the defendant, and the stone weir carried quite across the river. This weir was a solid piece of masonry, having three locks as the former wooden weir had, for the purpose of catching fish; but it appeared that since it had been completed, very few fish could pass, so as to be taken in that part of the river were the plaintiff's fishery was. The action was brought within three months before the expiration of twenty years from the last alteration. The jury, under the direction of the judge, had found a verdict for the defendant; the judge conceiving,

his house as to obstruct the windows of the other, however recently they may have been opened[1].

In the same manner as twenty years undisputed enjoyment will give the right, the same length of adverse possession will so far destroy it as to prevent the person originally entitled from abating the nuisance, or maintaining a possessory action for erecting it; and therefore, where a common has been adversely possessed in severalty by an inclosure during that time[2], or the grantee of a market[3] permits another person to erect another market in his neighbourhood without objection, and such new market is enjoyed for twenty years, neither the commoner nor the owner of the market will, after that time, be permitted to abate the nuisance or maintain an action on the case for the invasion of his right.

When the right is claimed by prescription, (and it is only in the case of copyholds that it can be claimed by custom,) the evidence must go to show the exercise of the right by the occupier of the particular land to which it is said to be appurtenant, for evidence that all the tenants of a manor have enjoyed it, is, in such case, not admissible[4]. And we have before seen[5], that in these cases of mere private prescription no evidence of

[1] Drummond *v.* Dorant, K. B. Sitt. at Westminster, after Easter T. 32 Geo. 3. Compton *v.* Richards, 1 Price, 27.

[2] Hawke *v.* Bacon, 2 Taunt. 156.

[3] Holcroft *v.* Heel, 1 Bos. & Pul. 400.

[4] Wilson *v.* Page, 4 Esp. Cas. 71.

[5] Ante, 16.

ceiving, that though this was originally a nuisance to the plaintiff's fishery, yet the length of time which had been suffered to elapse, had established the right of the defendant. The court, on a motion for a new trial, determined that the direction of the judge was wrong; Lord *Ellenborough* observing, that by Magna Charta, and other acts of parliament, the erection of weirs in rivers was a public nuisance; *that however twenty years acquiescence might bind parties where private rights only are affected, yet the public have an interest in the suppression of public nuisances, though of longer standing.* No objection however of this sort, his lordship said, could apply to this case, when the action was commenced within twenty years after the complete extension of the stone weir across the river, by which it was proved that the plaintiff had been injured. *Wild* v. *Hornby*, 7 East, 195. In *Vooght* v. *Winch*, 2 B. & A. 662, the court held, that even twenty years possession of water at a given height, was not conclusive in the case of a navigable river.

reputation

Part II. *Disturbance and Nuisance.*

reputation is received. But when to a plea of a prescriptive right of common, the plaintiff replied another prescription to use the *locus in quo* for tillage with corn, and until the carrying to hold and enjoy the land, the court held that many other persons having a right of common on the close, evidence of reputation, might be received of the plaintiff's right, a foundation being first laid by proof of the enjoyment of it[1].

[1] Weeks *v.* Sparkes, 1 M. & S. 679. Appendix 1.

The plaintiff must also show that the right is to the extent claimed. A person who has a right of way to his own close cannot, when he purchases a close beyond it, use the way for the purpose of going over his own close and thence to the land newly purchased[2]; and if the usage has only been to go with carts and horses, this will not, on an application of the land to other purposes, necessarily entitle the party to drive horned cattle through it, though it may be evidence of such a right, if fortified by other circumstances[3].

[2] Laughton *v.* Ward, 1 Lutw. 111.

[3] Ballard *v.* Dyson, 1 Taunt. 279.

The defendant, in answer to this, may show that the enjoyment was by the connivance or consent of one who had only a temporary interest in the estate, out of which the easement is claimed; and this will avoid the right which would otherwise arise from the usage. Thus, if a tenant for life or years permit a stranger to use a way, &c. through a close, this will give no title whatever, as against the remainder-man, who ought not to be bound by his fraud or laches[4]. So if the usage has been merely by favour, and acknowledged as such; as if a small rent has been paid to the defendant for it; or he has locked the gates when he thought proper, and kept the key; or done any other act which shows that the plaintiff did not claim it as a right, it will be proper evidence, on the part of the defendant, to counteract the effect which the usage unexplained would produce.

[296]

[4] Bradbury *v.* Grinsell, 2 Wil. Saund. 175, d. Vide Campbell *v.* Wilson, 3 East, 294. Daniel *v.* North, 11 East, 272.

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In these cases the plaintiff is not obliged to prove any specific injury to himself; that he has a right, and that such right has been *wilfully* invaded by the defendant, is sufficient; for if he were to wait until he could prove actual damage, the defendant by repeated invasions of a right, which can only depend on usage, might himself gain a title which could not afterwards be successfully opposed[1]. In actions, therefore, by a commoner against a stranger, proof of the plaintiff's right of common, and that the defendant's cattle were turned thereon by him[2], or that he took the dung away[3], is sufficient; but if the action be brought against the lord, or a third person, who puts cattle on the common by his licence, the plaintiff must also prove a specific injury, as that there was not sufficient common left; at least, if the defendant prove the contrary, it will be an answer to the action[4]

[1] Wells *v.* Watling, 2 Black. 1233; Hobson, *v.* Todd, 4 T. Rep. 71.

[2] Ibid.

[3] Pinder *v.* Wadsworth, 2 East, 154.

[4] Per Buller, J. 4 T. Rep. 73.

There is one case where, though the form of action is *trespass*, yet the proof will be the same, and governed by the same rules, as the above actions on the case; that is, the case of a fishery. *Prima facie* the right of the fishery will be in the owner of the soil; and, therefore, the first point will be, to prove property in it; this, in cases of rivers not navigable, is in the owners of the land on each side, to the middle of the river[5]; but in navigable rivers and arms of the sea, the presumption is that the soil is in the crown, and that every subject of the realm has a right to fish. In both cases, however, the *prima facie* right may be rebutted, and a person not the owner of the soil in the one case, or an individual in the other, may have the fishery by prescription[6]; and as usage is so important, proof of an attempt to catch fish, though unsuccessful, will be sufficient evidence in an action for disturbance in a *several* fishery[7].

[297]

[5] Carter *v.* Murcot, 4 Burr. 2162.

[6] Mayor of Orford *v.* Richardson, 4 T. Rep. 437.

[7] Patrick *v.* Greenway, 1 Williams's Saunders, [346, b.]

CHAP. VII.

OF THE EVIDENCE IN THE ACTION OF TROVER.

Part II. *Actions of Trover.*

THERE is another action on the case, which, being governed by a rule of pleading not admitted in the former, I shall mention in a distinct chapter. In the action of *trover*, the plaintiff does not truly state his case, but is permitted to use a fiction, and to say that he *lost* the goods, the value of which he seeks to recover; and that the defendant *found* them and *converted* them to his own use.

The general issue *not guilty* is the plea also used in this action, but, nevertheless, the plaintiff is not [298] put to prove the formal and fictitious part of his case. He must prove either a general and absolute property, and right of possession, at the time of the conversion, (in which case he is not obliged to prove any actual possession of the goods, for the legal possession follows the property [1];) or else he must show that he has a special property which renders him answerable to the true owner; and that at the time they came into the defendant's hands, he had also the actual possession of them [2].

[1] Bul. N. P. 33. 7 T. Rep. 13.

[2] Bul. N. P. 33.

But a person who has not the right to the immediate possession, but only a reversionary interest, cannot maintain the action; and therefore a man who has let his house ready furnished, or hired his goods to another able to contract for them, cannot maintain this action against a third person who seizes the goods [3]; but where the person to whom the goods were let was a married woman living separate from her husband, and therefore unable to gain any property in them, it was held that such a bailment did not deprive the real owner of his action of trover [4].

[3] Gorden *v.* Harper, 7 T. Rep. 12; Pine *v.* Dor, 1 T. Rep. 55.

[4] Smith *v.* Plomer, 15 East, 607.

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The plaintiff must then prove a *conversion* by the defendant. If it appear that the defendant gained the possession of the goods by force [1], or that, being entrusted with them, he actually converted them to his own use; as if a carrier draw out part of the liquor in a vessel, this is of itself sufficient, and no further evidence is necessary [2]; but in general where goods come into a man's hands by finding or delivery, it is necessary that a demand of them by the plaintiff, and a refusal to deliver them by the defendant, should be proved to show a conversion by him. This refusal is always evidence of a conversion, unless explained by the defendant [3]; but a refusal by a mere servant or agent, without the special directions of the defendant, will not make him liable [4].

[1] Baldwin *v.* Cole, 6 Mod. 212. B. N. P. 44.

[2] Richardson *v.* Atkinson, 1 Stra. 576. Vide Mulgrave *v.* Ogden, Cro. El. 219.

[3] B. N. P. 44.

[4] Pothonier *v.* Dawson, 1 Holt, 384.

The defendant may, on the *general issue*, controvert the plaintiff's property, by showing a better title in himself, or in some person on whose behalf he defends; but if the plaintiff had the possession, a mere stranger cannot object to his want of title; and, therefore, it is no defence to prove that the plaintiff only found the property [5]; or was himself an uncertificated bankrupt, at the time of the conversion [6]; or purchased of one who was so [7]; for, as against every person but the real owner, the possessor has a good title. So the defendant may rebut the evidence of conversion, arising from demand and refusal, by proving that he or the person, on whose behalf he acts, has a lien on the goods for a sum of money, and that the defendant offered to deliver up the goods, on payment of it, for until the lien is discharged, he is not obliged to part with the goods [8]; and, therefore, in such case the plaintiff must prove a tender of the money due. But if the defendant, on the demand being made, claim to retain them on a different ground, making no mention of the

[299]

[5] Armory *v.* Delamirie, 1 Stra. 505.

[6] Webb *v.* Fox, 7 T. Rep. 391. Fowler *v.* Down, 1 Bos. & Pul. 44.

[7] Laroche *v.* Wakeman, Peake's N. P. Cas. 140.

[8] Skinner *v.* Upshaw, 2 Lord Raym. 752. Yorke *v.* Greenaugh, Ib. 867.

Part II. *Actions of Trover.*

the lien, he cannot afterwards object that the money due to him was not tendered [1]. The defendant may also show that the goods being fairly in his possession were accidentally lost, as if goods are stolen from a carrier, or he otherwise lose them; for the action is founded on a wrongful conversion by the defendant, and not on mere negligence; to recover a satisfaction for which the plaintiff must resort to a special action on the case [2].

[1] Beardmore *v.* Sill, 1 Campb. 410.

[2] Ross *v.* Johnson, 5 Burr. 2825. B. N. P. 44, 45.

The defendant may also, on the *general issue*, prove that he is tenant in common, or joint-tenant, with the plaintiff [3]; and this will be a defence, unless the plaintiff prove that the defendant has actually destroyed the goods. If one of several joint-tenants, or tenants in common, bring the action against a stranger, this, though it may lessen the damages to the amount of the plaintiff's share on the *general issue* [4], will not defeat the action, unless pleaded in abatement.

[3] B. N. P. 34, 35. Brown *v.* Hodges, Salk. 290.

[300]

[4] B. N. P. 35.

The *statute of limitations*, or that the plaintiff *released* the defendant, must be specially pleaded. On the first plea, the *onus* will lie on the plaintiff, to prove the time when the conversion was made; on the other, the defendant must prove his release.

CHAP. VIII.

OF THE EVIDENCE IN ACTIONS OF TRESPASS AND REPLEVIN.

Ch. VIII. *Trespass and Replevin.*

IN *trespass* the general issue is *not guilty*; in *replevin*, *non cepit*; and on these issues only the simple fact of the commission of the trespass, or taking the goods, can in general come in question. If the place be material, as in all local actions it is, the plaintiff must, on these issues, prove that the trespass or taking was at the place mentioned in his declaration; but in actions which are not local, as in

in trespass committed on the person or personal property of the plaintiff, it is sufficient to show that a trespass of the kind complained of was committed by the defendant, though at a place different from that named [1]. Every person concurring in the commission of the trespass is deemed a principal, and therefore, though the defendant did not personally interfere, yet if he aided another, (as where a person, having been warned off certain land, conducted other persons to the spot, and waited outside the fence whilst the others went in to shoot the game being therein [2];) or commanded his servant to commit the trespass, he will be liable to the action.

[1] Vide ante, 205.

[2] Hill *v.* Wathen, cor. Laurence, J. Gloucester Sp. Ass. 1806.

The declaration in trespass generally states the trespass to have been committed on a certain day, and on divers other days between that day and the commencement of the suit. The plaintiff on this declaration may prove any number of trespasses committed within the time mentioned in the declaration, or he may prove one trespass committed before the first day named in it. In this latter case he waves all other trespasses, and will not be permitted to give evidence of them [3]. In general the declaration should state all the acts which the plaintiff intends to give in evidence, otherwise the defendant might be taken by surprise. There seems formerly this distinction to have been made, viz. that where there were distinct trespasses the plaintiff could only give evidence of that which was stated on the record; but that, where there was one continued trespass [4], matters which were not stated might be given in evidence under the *alia enormia* alleged in the declaration. The former cases proceeded principally on the idea, that matters which would stain the record by their indecency need not be alleged; and, therefore, where trespass was brought for breaking the house, the plaintiff was permitted

[301]

[3] Vide Bul. N. P. 86.

[4] Vide 6 Mod. 127, and cases cited. Peake's Cas. 3d edit. 65, n. (*a*.)

Part II. *Trespass and Replevin.*

to prove in aggravation, that the defendant while there debauched the plaintiff's daughter. At the time of this decision it was generally understood, that no action would lie for the latter injury unless as an aggravation of the other; and therefore the judges might be inclined to strain a point to let in evidence of that, which was substantially and in truth the cause of action. But, in more modern cases, it has not been permitted to a plaintiff, who complains of an imprisonment of his person, to show that he was stinted in his food [1], or that he caught an infectious distemper [2], without alleging one as part of the trespass, or the other as the consequence of it. Still, however, the plaintiff may prove any fact accompanying the trespass, indicative of the motives of the defendant, and which could not be considered as itself a trespass, for the purpose of showing malice in the defendant; and therefore in an action for breaking and entering the plaintiff's close, and searching therein for game, the judge permitted the plaintiff to prove that the defendant, being a member of parliament and a magistrate, had, on being warned off the land, used very intemperate language to the plaintiff, and threatened to commit him, and the jury having given 500*l.* damages, the Court of Common Pleas refused a new trial [3].

[1] Lowden v. Goodrich, Peake's Cas. 46.

[2] Petitt v. Addington, Ib. 62.

[3] Meret v. Harvey, 5 Taunt. 442.

If an act be committed by the defendant, which unexplained amounts to a trespass; or, if in replevin, he insist on his right to take the goods, he must justify or avow the trespass or taking on the record, before any evidence can be received in justification of it; but where the act itself without explanation appears to be no trespass; as where the defendant was a mere pound-keeper, and as such received the plaintiff's cattle from a third person, the general issue is sufficient [4]. There is one case, however, where that which *prima facie* appears to be a tres-

[4] Badkin v. Powell, Cowp. 476.

pass,

pass, may be justified, on the general issue; and that is, where the land is the freehold of the defendant, or of another by whose order he entered, for here he does not enter on the property of the plaintiff, who is himself a trespasser[1]. Actual possession, or receipt of rent, is *prima facie* evidence of title.

[1] Derisly *v.* Nevil, 1 Leon. 301. Dodd *v.* Kyffin, 7 T. Rep. 354. Argent *v.* Durrant, 8 T. Rep. 403.

In actions of trespass, where a right is claimed to an incorporeal hereditament, which must arise by grant or prescription; the defendant is obliged to state his title particularly. He cannot, as in actions on the case, rely barely on his possession. In general such right is claimed by *prescription*; and [302] where the usage has been as long as any one can remember, such plea will be supported; for posterior usage is evidence of the antecedent right[2]; and therefore a jury will be directed to presume that it has existed, from the commencement of legal memory. But in cases where the origin of the usage can be traced, as if a right was never exercised till within the last twenty or thirty years, though the uninterrupted exercise of it for that time may be sufficient to presume a *grant*, yet it will not support an immemorial *prescription*. In these cases, therefore, a practice has been lately introduced of pleading, in addition to the prescriptive right, a grant, about the time when the usage commenced, from the person then in possession of the land, and that such grant has been lost by accident[3]. The plea must name the person who is supposed to have made the grant, for a general statement that the date and names of the parties are unknown will not be sufficient[4]; but when the grant is properly pleaded, twenty years undisputed possession will be sufficient to presume it[5], and the defendant by this mode of pleading has every advantage which he would have, if plaintiff, in an action on the case.

[2] 2 Atk. 137.

[3] Vide Reed *v.* Brookman, 3 T. Rep. 151.

[4] Hendy *v.* Stephenson, 10 East, 55.

[5] Campbell *v.* Wilson, 3 East, 294.

Part II. *New Assignment.*

When the defendant pleads a special plea, and issue is joined upon it, the party alleging the affirmative must prove his case. But it behoves those who conduct a cause, on the part of a plaintiff in trespass, to be particularly careful that the pleadings are so framed, as to bring the real case before the jury; for where a defendant pleads a justification, and concludes with an averment that it is the same trespass, and the plaintiff traverses the cause of justification, if the defendant has any such right or excuse, as that mentioned in his plea, he will succeed; for the plaintiff will not be permitted to give evidence of any other trespass, though such in fact were the real cause of action. If the trespass were committed in a place not named in the declaration, and the defendant plead *liberum tenementum*, the defendant may apply his plea to any other place, in the same parish, of which he is seised; and to enable himself to prove the trespass to have been committed where it really was, the plaintiff must make a *new assignment*, particularly describing the *locus in quo*. So if a larger trespass were committed than is mentioned in the plea, or than was necessary for the enjoyment of the right claimed; or another trespass were committed at a different time; the plaintiff will be estopped from giving any evidence, unless he state these in a new assignment, the nature and occasion of which is well explained by the learned editor of *Saunders*'s Reports, who collects and arranges the numerous cases which are to be found on this subject.

[303]

Vide Williams' Saunders, vol. 1. 299, a. note 6. Vol. ii. 5, note 3.

CHAP. IX.

[304]

OF THE EVIDENCE IN THE ACTION OF EJECTMENT.

SECTION I.

Of the Plaintiff's Evidence in general.

IN the action of *ejectment* the defendant is obliged, on his being permitted to defend, to enter into a rule to confess the formal and fictitious part of the case; viz. the lease to the plaintiff; that he entered into possession of the premises; and that the defendant ousted him. Under this condition he is permitted to plead the general issue; and on that plea the title of the parties is the only matter in controversy.

But as this is a possessory action, the plaintiff must prove such a title in his lessor as authorizes him to *enter* into the land; for where his right of *entry* is taken away, or *tolled*, as the legal expression is, and his title turned to a naked right *of action*, a *real action*, and not an ejectment, is the proper remedy (*a*).

In all cases where the party may, by *entry* alone, acquire the *legal possession* of lands, or, as Lord *Mansfield* said, where entry is only necessary *to complete his own title*[1], he may maintain an ejectment without any proof of an *actual entry* by him; for as by the ancient practice of ejectment, before the consent rule was adopted, it was necessary for the lessor of the

[305]

[1] Dougl. 484.

(*a*) It is foreign to the plan of the present work to enter into a discussion of the abstruse and intricate doctrine of discontinuance, disseisin, and descents; but it may not be improper to refer the reader to 3 Black. Com. ch. 10; *Taylor* dem. *Atkins* v. *Horde*, 1 Burr. 60; *Rumnington's* Treatise on Ejectment, 42 to 58; for instructions on this point.

Part II. *Entry.*

plaintiff to enter on the land, and there seal a lease; the confession of such lease, according to the modern practice, includes in it all necessary formalities, and, amongst others, the entry into the land for that purpose.

But when a fine *with proclamations* has been levied by a person in *adverse* possession of the land, and having a freehold in it, whether legal or tortious, this fine entirely *devests* the estate of every other person until it is *regained* by one of the means pointed out by the statute 4 Hen. 7, c. 24. This may be done in the instances of a fine levied by a mere *tenant for life*, or one who has only a *tortious estate* (*b*), either by commencing a *real action*, or *making an entry*, for the express purpose of avoiding the fine, provided this be done within the time limited by that act of parliament, viz. within five years after the proclamations made, if the party has a present interest, and is under no legal disability; or otherwise, within five years after the title of the party accrues, or his disability is removed [1]. An entry, therefore, is necessary in this case, not merely for the purpose of *completing the lessor of the plaintiff's title*, but of *rebutting that of the defendant* [2], and in order to *replace* the estate which was so *devested*; and immediately he has made it the fine is avoided, his estate revests, and he has the same title as if no fine had been levied. But since the statute of 4 Anne, c. 16, he must prosecute his entry, or claim, by action within a year, otherwise it will not avail.

[306]

[1] Vide post, 332.

[2] Dougl. 484.

In this case therefore, and in this case only [3], the formal admission is not sufficient, but an *actual entry* must be proved to have been made by the lessor of the plaintiff, or by some person on his behalf, pre-

[3] Vide Berrington *v.* Parkhurst, 2 Stra. 1086. Oates dem. Wigfall *v.* Brydon, 3 Burr. 1895. Goodright dem. Hare *v.* Cator, Dougl. 477.

(*b*) If tenant in tail levy a fine, the remainder-man can avoid it only by *real action*. *Moore* v. *Blake*, Runnington's Ejectment, 45; vide Bul. N. P. 99.

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vious to the day of the demise laid in the declaration [1]. This entry must appear to have been made by the command of the lessor of the plaintiff [2]; or at least assented to by him afterwards [3]; though it is said that the bringing of the action is itself sufficient evidence of such assent [4] (c). The entry must be made on some part of the lands comprised in the fine in the name of the whole [5]; and it should also appear, that the person entering declared that the entry was made for the purpose of avoiding all fines [6]. In cases where an entry could not be made without personal danger, (a case which, in the present improved state of society, can hardly ever happen), it will be sufficient to prove that a claim was made in the like form, as near the estate as the person making it could come [7]; and, in either case, unless it appear on the record that the action was commenced within a year afterwards, this fact should also be proved in evidence.

A fine levied by a bare tenant *for years*, without having previously obtained a tortious fee, by feoffment or otherwise, does not operate at all against strangers. In such case, therefore, no entry is necessary [8]; neither is it to avoid a fine at common law without proclamations [9]; or where the ejectment is commenced before the proclamations are completed [1]; and if one tenant in common, being in receipt of the whole rents, levy a fine of the whole land, this will not affect the estate of his co-tenant, so as to render it necessary to make an entry, unless there be some further evidence of an actual ouster before the fine was levied [2]. What will amount to

(c) A guardian may enter for his ward without command or assent; and, if a remainder-man, or lord, enter in the name of a tenant for life, or copyholder, or the tenant for life, or copyholder, in the name of the remainder-man, or lord, it is also sufficient without command or assent, on account of the privity between those persons; and the like rule holds in respect of tenants in common, joint-tenants, and co-parceners. *Podger's* case, 9 Co. 106, a.

evidence

[1] Berrington *v.* Parkhurst, ub. sup.
[2] 9 Rep. 106, a. Poph. 108.
[307]
[3] Fitchet *v.* Adams, 2 Stra. 1128.
[4] 1 Williams' Saunders, 319, a.
[5] Focus *v.* Salisbury, Hard. 400.
[6] See William's Saunders, 319, c. also Ford *v.* Ld. Grey, 6 Mod. 44.
[7] Lit. s. 421.
[8] Smith *v.* Parkhurst, 18 Vin. 413.
[9] Jenkins *v.* Pritchard, 2 Wils. 45.
[1] Doe dem. Ducket *v.* Watts, 9 East, 17.
[2] Peaceable dem. Hornblower *v.* Read, 1 East, 568.

Part II. *Statute of Limitations.*

[308]

evidence of an actual ouster, we shall have occasion to mention hereafter.

The stat. 21 Jac. 1, c. 16, enacts, that none shall make *any entry* into lands but within twenty years next after his title shall first descend or accrue; and from what was said in the commencement of the present chapter, that the plaintiff must show a right of *entry* in his lessor, it follows that no ejectment can be maintained after that time. Therefore it is always necessary for the plaintiff to prove possession in himself, his ancestor, or a tenant within twenty years; or to account for the want of it, under one of the exceptions allowed by the statute. But where there has been a lease from an ancestor of the lessor of the plaintiff, it is not necessary for him to show any payment of rent under it within twenty years, for his title or right of entry does not accrue till the expiration of the lease, and consequently the statute cannot begin to operate against him till that time [1]; and if a forfeiture has been committed by the tenant it makes no difference, for he is not obliged to enter for such forfeiture [2]. An adverse possession during twenty years is not merely a bar to the action or remedy, but takes away the right of possession; and for this reason it is that the defendant need not plead the statute of limitations as in other cases; and on the same principle, in one case, where *A.* being lessor of the plaintiff, proved that he had been in uninterrupted possession for twenty years, and that the defendant entered on the land, it was holden that this possession of *A.* was a sufficient title to enable him to maintain the action, for that by it the entry of the defendant was tolled, and consequently illegal [3].

[1] Orrel *v.* Maddox, Runnington's Ejectment, 458.

[2] Doe dem. Cooke *v.* Danvers, 7 East, 299.

[3] Stokes *v.* Berry, Salk. 421.

But to prevent the plaintiff from recovering, it must appear that the possession was *adverse*; the possession of a tenant during his term was before observed not to be so; neither is the possession of a joint

a joint-tenant, parcener, or tenant in common, without proof of an *actual ouster*.

What shall amount to such proof does not seem to be very accurately determined. Lord *Holt* is reported to have said, that the rule of the possession of one tenant in common being the possession of the other, did not hold place against the statute of limitations; and that if one of them only takes the profits, it is an *ousting* of the other [1]; but in subsequent cases it has been said, that bare perception of the whole profits does not amount to this [2]; and, therefore, where one tenant in common had been in receipt of the whole rents for twenty-six years, yet as there was no evidence of his having actually *claimed the whole estate*, but, on the contrary, it appeared *that he was admitted* (the land being customary freehold) *to a moiety* only, it was holden to be no *ouster*, and that the statute did not attach [3]. And the like decision took place where one tenant in common levied a fine of the whole premises, and there was no other evidence of adverse possession [4]. But though bare perception of the profits is not itself an *ouster*, yet if continued for a great length of time without any claim by the party out of possession, it may be evidence for the jury to presume one: as where partition was made of an estate of two women, who were tenants in common in tail, and one part was assigned to the husband of one during his life, and it was proved that after his death his wife remained in possession for thirty-six years, and there had been no acknowledgment of title, nor accounting for the rents; the judge left it to the jury to *presume* an *actual ouster*, and they having found accordingly, the court held that the statute barred the action [5]. In that case Lord *Mansfield* said, the possession of one tenant in common, *eo nomine*, as tenant in common, can never bar his companion; because such possession is not adverse to the right of his companion, but in support of

[309]

[310]

[1] 1 Lord Raym. 312.

[2] Vide Reading *v.* Rawsterne, 2 Lord Raym. 820. 5 Burr. 2604.

[3] Fairclaim dem. Empton *v.* Shackleton, 5 Burr. 2604. 2 Black. 690. S.

[4] Peaceable dem. Hornblower *v.* Read, ante, 329.

[5] Doe dem. Fisher and another *v.* Prosser, Cowp. 217.

Part II. *Actual Ouster.*

of their common title, and by paying him his share, he acknowledges him his co-tenant. Nor, indeed, is a *refusal to pay* of itself sufficient without *denying his* title. But if, upon demand by the co-tenant of his moiety, the other refuses to pay, and *denies his title, saying he claims the whole*[1], and will not pay, and continues in possession, such possession is adverse, and *ouster enough*. Then adverting to the circumstances of the particular case, and observing that there was no evidence of any account demanded, or of any payment of rents and profits, or of any claim by the lessors of the plaintiff, or of any acknowledgment of title in them; his lordship added, therefore I am clearly of opinion, that an undisturbed and quiet possession for such a length of time, is a sufficient ground for the jury to *presume* an actual *ouster*, and that they did right in so doing.

[1] Vide also Doe dem. Hillings v. Bird, 11 East, 49. S. P.

Disability in Plaintiff.

The disabilities mentioned in the statute of Hen. 7, as to fines, and also in the statute of James 1, are infancy, coverture, insanity, being imprisoned, or beyond the seas. Persons labouring under either of these disabilities, or their heirs[2], may make their entries in the case of a fine, within five years, and in other cases with ten years, after the removal of the disability, notwithstanding twenty years may have elapsed; and, therefore, in either of these cases where the ordinary time is gone by, and the person suing, or his ancestor, was within this exception, the lessor of the plaintiff should be prepared with proof of it. Here it may be observed, that the disability should be shown to have existed at the time when the fine was levied, or the title accrued, and to have continued till within the time of limitation, for when once the statute has begun to operate, no subsequent disability will prevent its progress[3]. And if an estate descend upon two parceners, one of whom is under coverture, and the other a *feme sole*, though the time given by the statute will extend to the moiety of the

[311]

[2] Vide Doe dem. George v. Jesson, 6 East, 80.

[3] Doe dem. Durour v. Jones, 4 T. Rep. 300.

feme

feme covert, the other must sue for her moiety within twenty years after her title accrues[1].

It should seem that previous to the statute 4 Ann. c. 16, the party claiming title to lands in cases where the right of entry was not barred, might have avoided the operation of the statute of James altogether, by making continual entries on the land; for as actual entry gave complete possession[2], so every entry gave a new date from which the operation of the statute commenced. In this case, however, it was necessary to prove an *actual entry*[3]; and for this there seems to be good reason, for if the formal confession of entry had been sufficient, the necessary consequence would have been, that in no case whatever would the statute have had operation. Therefore, even if one ejectment were brought, and the plaintiff failed, the confession in that action would not have helped him in another brought after the expiration of the twenty years[4]. This mode of evading the statute of James was remedied by the statute of 4 Ann. c. 16, s. 16, whereby it was enacted, That no claim or entry to be made of or upon any lands, &c. should be of any force or effect to avoid any fine to be levied with proclamations, or should be a sufficient claim or entry within the statute of James, unless upon such claim or entry an action should be commenced within one year next after the making such entry or claim, and prosecuted with effect. Mr. *Douglas*, adverting to what was said in the law of *Nisi Prius*, makes a question, whether it is not necessary to make an actual entry to prevent the operation of the statute of limitations[5]. To which it may be answered, that it certainly is, if an action is to be brought *after* the expiration of twenty years from the time of actual possession; and in cases where the statute of limitations has nearly run, it may be prudent to adopt that measure, the effect of which will sometimes be to

[1] Roe dem. Langdon *v.* Rowlston, 2 Taunt. 441.

[2] Vide Co. Lit. 15; 3 Black. Com. 175.

[3] Ford *v.* Grey, Salk. 285, 6. Mod. 44, S. C.

[312]

[4] Vide 12 Mod. 573, and Bul. N. P. 102, where that book is cited as Cas. K. B.

[5] Dougl. 485, n. (1.)

Part II. *Defendant's Possession.*

to give the lessor of the plaintiff an additional year within which to bring a second ejectment in case of failure in the first; for if it be proved that a person having title, just at the conclusion of twenty years adverse possession, made an actual entry on the land, and that he brought his ejectment within a year afterwards, it seems that the statute will not bar him [1]; whereas if, without making any entry, he had brought his ejectment and failed, he would have been without remedy in this form of action; for the formal confession of entry in the first ejectment would not, as we have before seen, have been a sufficient entry to enable him to bring another after the expiration of the twenty years.

[313]

[1] Vide 1 Williams' Saund. 319, c.

It seems to have been formerly doubted whether when an ejectment was brought by one tenant in common against another, it was not necessary on the part of the lessor of the plaintiff to prove that he was actually ousted by his co-tenant [2]; but it is now clearly settled, that such evidence is not necessary, but is supplied by the confession in the rule [3]. If indeed the party in possession has never disputed the title of his co-tenant in common, he will not be obliged to make this confession [4]; but, as was observed by Lord *Mansfield*, in *Wigfall* v. *Brydon*, it is scarcely possible to suppose that a tenant in common should bring an ejectment, where there is not an actual outster, viz. a denial of his title. Still, as there may be cases in which a tenant in common may be admitted to defend without confessing ouster, it is incumbent on the plaintiff to produce the consent rule to show that he has done so [5].

[2] Vide 7 Mod. 39.

[3] Oates dem. Wigfall *v.* Brydon, 3 Burr. 1895.

[4] Doe dem. Gigner *v.* Roe, 2 Taunt. 397.

[5] Doe dem. White *v.* Cuff. 1 Campb. 173.

Great inconvenience has frequently arisen by reason of the plaintiff being called on in all cases to prove that the defendant was in possession of the lands for which the ejectment was brought; to obviate which, general rules have lately been made by all

all the Courts at Westminster, making it incumbent on the defendant, in all cases, to specify the premises for which he defends, and, to admit that he was in possession of them at the time of the service of the declaration in ejectment.

SECTION II.

Of the Defendant's Evidence in general.

I HAVE confined my observations concerning the evidence on the part of the plaintiff to that *formal* proof which every plaintiff in ejectment may be called upon to give. I have, however, observed, in the outset, that he must prove a legal title in himself. It follows, that if the defendant prove a title in any other person, he gives an answer to the plaintiff's claim; and though it was at one time held, that if the plaintiff were really entitled to the possession of the premises, *a bare legal title* should not preclude his recovery; yet it is now clearly settled, that if the legal estate be shown to be in any other person he cannot recover.

During the time that the former doctrine prevailed, the court would not permit a party who did not mean to disturb outstanding incumbrances to be turned round by them; and, therefore, if a term were created for particular purposes, and the person entitled to the possession, subject to the incumbrances, for the security of which such term was created, brought an ejectment; it was not permitted to a third person, claiming under the same title as the plaintiff, to set up this term as an answer to the action[1]. On the same principle, if a mortgagee whose mortgage bore date subsequent to a lease, gave notice to the tenant that he did not mean to disturb his possession, but only

[315]

[1] Vide Doe dem. Bristowe v. Pegge, 1 T. Rep. 758.

Part II. *Outstanding Terms.*

only sought the recovery of the rents and profits, the tenant was not suffered to set up his prior title by lease, or in case of a holding from year to year, to object to the want of notice to quit, and thereby defeat the ejectment of the mortgagee. The contrary, however, is now established by a variety of cases; and therefore, if the existence of such term be proved on the part of the defendant, the plaintiff cannot recover, unless there be evidence on his part for the jury to presume a surrender of the term.

This can never be done where the purposes for which the term was created are not completely answered; so that where a term was created for the purpose of securing an annuity, it was holden that during the life of the annuitant, the heir-at-law could not recover on his own demise, though he claimed subject to the charge[1]; and where an old term has been from time to time recognized as existing till within a few years before the time of trial, and an ejectment is brought by the trustees named in it, with the concurrence of the owner of the inheritance, who is interested in upholding it, a jury will not be directed to presume a surrender[2]. But where it is in proof, on the part of the plaintiff, that the trusts, on which the term was created, have been completely fulfilled, so that the trustees *ought* to have conveyed, the jury will be directed to presume that in point of fact *they have done so*, though there is no direct evidence of the fact[3]. Thus, in one case, where a man by will, dated in Dec. 1777, devised certain premises to three persons as trustees, for his son's maintenance till he came to twenty-one years of age, and then to convey to him; the son came of age in 1788, and in 1789 made a lease, and that lease being relied on by the lessor of the plaintiff in an ejectment brought in the year 1792[4]; and by the same party, when defendant, in another ejectment brought against him in the

[1] Doe dem. Holsdon *v.* Staple, 2 T. Rep. 684.

[2] Doe d. Graham *v.* Scott, 11 East, 478.

[3] Doe dem. Howell *v.* Lloyd, App. [316]

[4] England dem. Sybourn *v.* Slade, 4 T. Rep. 683.

the year 1796[1]; the Court of King's Bench, in both instances, held that the jury might presume a conveyance by the trustees, for their trust having expired, it was their duty to do so (*d*). But if the jury do not find such surrender as a fact, in a special verdict or case, the court in this, as well as all other instances of facts resulting from evidence, is precluded from drawing the conclusion[2].

[1] Doe dem. Bowerman *v.* Sybourne, 7 T. Rep. 2.

[2] Vide Goodtitle dem. Jones *v.* Jones, 7 T. Rep. 47.

In cases where a term is in all events to take place, the *onus* lies on the lessor of the plaintiff to prove that the purposes for which it was created have been satisfied; but, where the conveyance is conditional only, as in the case of an old mortgage for years, the defendant must give further evidence than the mere proof of the mortgage deed. He should, in this case, also prove either a possession under it, or payment of interest by the mortgagor, subsequent to the day of redemption, and within twenty years; for otherwise the presumption is, that the money was paid at the day, and, consequently, it is no subsisting title[3].

[317]

[3] Wilson *v.* Witherby, Bul. N. P. 110.

(*d*) In 1717, a term of 1,000 years was created, which in 1735 was assigned to secure an annuity to *A.* and afterwards to attend the inheritance. *A.* died in 1741, and the estate remained undisturbed, in the hands of the owner of the inheritance and her devisee from 1735 to 1813, without any notice of the term, except that in 1801 the devisee, in whose possession the deeds creating and assigning it were found, covenanted to produce those deeds when called for. In an ejectment by the heir-at-law of the testatrix, the estates devised being spent, the court held that a surrender might be presumed. *Doe* dem. *Burdett* v. *Wright*, 2 Barne. & Ald. 710. In another case, a term of years was created in 1762, and assigned over to a trustee to attend the inheritance in 1799. In 1814 the owner of the inheritance executed a marriage settlement, and in 1816 he conveyed his life interest to a purchaser, as a security for a debt, but no assignment of the term, or delivery of the deeds relating to it, took place on either occasion. In 1819, just before the trial, an actual assignment of the term was made by the administrator of the trustee in 1779, to a new trustee for the purchaser of 1816. Held, that under the circumstances, on an ejectment brought by a prior incumbrancer against the purchaser, the jury were warranted in presuming that the term had been surrendered previously to 1819. *Doe* dem. *Putland* v. *Hilder*, 2 B. & A. 782.

Part II. *Outstanding Terms.*

But here it should be observed, that it is not every person who is in condition to avail himself of terms outstanding in a third person; a tenant is never permitted to dispute the title of his landlord; nor a mortgagor to show that he himself had no title at the time of making the mortgage[1]; and Lord *Mansfield* said, in the case of *Lade* v. *Holford*, that he would never suffer a plaintiff to be nonsuited by a term outstanding in his own trustee, but direct the jury to presume it surrendered[2]. But it is now held, that whether the ejectment be between the *cestui qui trust* and his trustee, or between him and any third person, if the term be *unsatisfied*, the person, having only an equitable interest, cannot recover[3].

[1] Lindsey v. Lindsey, Bul. N. P. 110.

[2] Vide 3 Burr. 1416. Bul. N. P. 110.

[3] Roe dem. Reade v. Reade, 8 T. Rep. 122.

The inconveniences attending the present practice of requiring a strict legal title were very ably pointed out by Mr. Justice *Buller*[4], and his argument would be unanswerable, did not a court of equity interfere on this subject; and in cases where the circumstances under which the person beneficially interested stands, are such as to render it advisable that he should have the possession, extend its interference to prevent an outstanding term from being set up to defeat his recovery.

[4] 2 T. Rep. 698.

[318]

SECTION III.

Of the Evidence in Ejectment, by Landlord against Tenant.

Sect. 3. *Evidence in Ejectment.*

THE action of ejectment, by a landlord against his tenant, can be brought only in two instances; one, where the demise is at an end by effluxion of time, or voluntary act of the parties; the other where the tenant has committed a forfeiture.

In neither case will the lessor of the plaintiff be called on to give any evidence of his title anterior to the lease[5], for neither the tenant, nor any other person who

[5] England dem. Sybourn v. Slade, 4 T. Rep. 683.

who came into possession under him[1], will be permitted to dispute the title of the person from whom the former took the premises; he may, indeed, show that the title has since expired, but he cannot be permitted to prove that he originally had none[2] (*e*).

The lessor of the plaintiff, therefore, in the first case has only to prove the demise, and that the term has been determined. This may be done either by proving the counterpart of the lease by the subscribing witness, in cases of a demise by deed, (which seems to be sufficient without any notice to produce the original[3];) or, where the demise was by parol

[1] Doe dem. Knight *v.* Smyth, 4 M. & S. 34. *On Determination of Demise.*

[2] Doe dem. Jackson *v.* Ramsbottom, 3 M. & S. 56.

[3] Vide ante, 93, note (*c*).

(*e*) It has long been established as a general principle, that a tenant shall not be permitted to dispute the title of his landlord, *vide ante*, 259; but in a case which occurred at *Nisi Prius* before Mr. Justice *Bayley*, that learned judge held, that where a person who had paid rent afterwards and before any ejectment was brought refused to pay more rent, insisting that the supposed landlord was not entitled, that such refusal enabled him, when defendant in ejectment, to give evidence of the title of another, and that in such case the payment of rent was only *prima facie* evidence of the title of the person to whom it was paid. Vide *Doe* dem. *Bailiff, &c. of Clun* v. *Clarke* and others, Appendix.

In a case which afterwards came before the Court of Common Pleas, (*Rogers* v. *Pitcher*, 6 Taunt. 202), the generality of this doctrine was explained, and in some measure limited. It was holden in that case (which was an action of replevin), that the payment of rent was only *prima facie* evidence of ownership, and did not preclude the person paying from showing a title in a third person; and the Chief Justice *Gibbs* said, "The payment of rent raises a presumption that the party receiving it had a good title to it, but it is a presumption only, and capable of being rebutted. The same doctrine which I now lay down was held by *Bayley*, J. in an ejectment at Shrewsbury for cottages, for which rent had been paid to the corporation; the payment of rent was certainly *prima facie* evidence of their title. My brother *Bayley* held, that the defendant having disclaimed to hold under the corporation, that was equivalent to a notice to quit, and left them at liberty to show who was the real proprietor of the soil. This doctrine must be taken with reference to the subject-matter, and to the case in which it is laid down. It was not a case in which the tenants had been *let into possession* by the corporation. If it had been, I should have thought that the defendants never could have disputed the title of the corporation while they continued in possession; but these were cottages built on the waste, and the corporation claimed to be lords of the manor, and the tenants, who at first acquiesced, being afterwards advised of other landlords, disclaimed to hold of the first."

Part II. *Of the Demise.*

[319]

for a certain time, by some person present at the making of it. In cases of tenancy from year to year, which almost every demise is now deemed to be, unless some definite time be fixed on, the lessor of the plaintiff must also prove that the demise has been determined by a regular notice to quit. The notice which is generally required is half a year, expiring at the same season of the year as that when the defendant entered[1]; but where the custom of the country requires a longer or shorter time of notice, it has been said, that such custom will control the general rule[2].

[1] Right dem. Flower *v.* Darby, 1 T. Rep. 159.

[2] Vide Roe dem. Brown *v.* Wilkinson, Butl. Co. Lit. and Roe dem. Henderson *v.* Charnock, Peake's Cas. 5.

Notice to quit.

In cases of this description, it is often difficult to give direct evidence of the demise, and where that cannot be done, the subsequent payment of rent will be *prima facie* evidence of an antecedent demise from year to year (*f*); but to enable the party to show on whose behalf the rent was received, notice should be given to the defendant to produce his receipts. If one joint rent has been paid to an agent of several parties on their behalf, though such agent was appointed by the several parties at different times, such payment will be evidence of their joint title[3]. After this general evidence of a demise from year to year, the proof of a notice to quit having been served on the tenant himself, and no objection made by him at the time[4], has been held to raise a presumption that the year expired at the time mentioned in it, and to make it incumbent on the tenant to show the commence-

[3] Doe d. Clarke *v.* Grant, 12 East, 221.

[4] Roe dem. Clarges *v.* Foster, 13 East, 405. Doe dem. Leicester *v.* Biggs, 2 Taunt. 109. Doe dem. Puddicombe *v.* Harris, cited 1 T. Rep. 161.

(*f*) This is in all cases *prima facie* evidence of a tenancy from year to year, and we have before had occasion to remark (*ante*, 257) that after such evidence, the defendant could not turn the plaintiff round by general evidence of an agreement in writing which he had not given notice to produce, and of which he was not prepared to give regular evidence. It may be also here observed, that where a tenant had been let into possession of premises under a promise to execute an agreement and bring a surety, but had afterwards refused to do so, the court held this conduct on his part to be a rescinding of the agreement, and to make him a trespasser, or at least a mere tenant at will, so that the landlord might eject him without a regular half-year's notice, or any evidence of the contents of the paper writing which he had rescinded. *Doe* dem. *Bingham* v. *Cartwright*, 3 B. & A. 326.

ment

ment of the tenancy, if, indeed, it did commence at another season (*g*); and even where a notice was general, to quit at the end of the current year, and the defendant was at the distance of near a year afterwards personally served with a declaration in ejectment, wherein the demise was laid six months after the service of the notice without objection on his part to the notice, Lord *Ellenborough* left it to the jury to consider whether that circumstance did not

Doe dem. Woombwell *v.* Baker, 2 Campb. 559.

(*g*) Difficulties have frequently arisen where, by the custom of the country, the tenant enters upon different parts of the premises at different periods of the year. A case of this kind lately occurred; the tenant had agreed "to enter on the tillage land at Candlemas, and on the house and all the other premises at Lady-day following; and that, when he left the farm, he should quit the same according to the times of entry as aforesaid;" the rent was reserved half-yearly at Michaelmas and Lady-day. The landlord, half a year before Lady-day, but less than half a year before Candlemas, gave notice to quit *at the end of the year*; and the court held this notice to be good; the taking being in substance from Lady-day, with a privilege for the in-coming tenant to enter on the arable land at Candlemas for the purpose of ploughing. *Doe* dem. *Strickland* v. *Spence*, 6 East, 120. But in a subsequent case (*Doe* dem. *Lord Bradford* v. *Watkins*, 7 East, 551,) where a demise was made in January of a dwelling-house and other buildings, for the purpose of carrying on a manufacture, together with certain meadow, pasture, and bleaching-grounds, for thirty-five years, to commence, as to the meadow, from 25th of December last; as to the pasture, from 25th of March next; and as to the rest of the premises, from the 1st of May, reserving the first half year's rent on the day of Pentecost, the other at Martinmas: it was held, that the substantial time of entry to which the notice ought to refer was the 1st of May, when the house and manufacturing buildings were entered upon; and in another case (*Doe* dem. *Heapy* v. *Howard*, 11 East, 498,) the demise being of a messuage and several closes of land thereunto belonging, containing thirteen acres, for eleven years, to hold the lands from the 2d of February, and the house and other premises from the 1st of May, rent payable half yearly, at Michaelmas and Lady-day, and a notice was given to quit on the 1st of May, or whenever else his tenancy should expire, it was objected at the trial that the notice, not having been given six months before the 2d of February, when the land, which it was contended was the principal subject of the demise, was entered upon, was not sufficient; Mr. Baron *Wood*, who tried the cause, nonsuited the plaintiff: and, on a motion for a new trial, the court refused a rule, saying, it must in all cases depend on the relative value and importance of the house and land together, which was the principal and which the accessary, and that if the plaintiff disputed the fact assumed by the judge, that the land was the principal, he should have desired him to leave it to the jury.

Part II.
Notice to quit

[320]

amount to an admission, on the part of the tenant, that the tenancy determined at the time mentioned in the declaration. But if the notice was left at his house, the lessor of the plaintiff will be called on to give some further evidence of the commencement of the term [1]. When it is uncertain whether the year expired at new or old Lady-day, a notice to quit "on the 25th of March, or the 8th of April," has been holden to be sufficiently certain; and, if delivered half a year before the first of those days, throws it on the tenant to show that it expired at some other time [2]. So where the year expired at old Lady-day, and the notice was to quit at Lady-day, without saying old Lady-day, the notice was holden to be sufficient to maintain an ejectment after old Lady-day [3]. It is sufficient if this notice were left at the dwelling-house of the tenant with a servant there, though such dwelling-house formed no part of the demised premises [4]; and if there be a joint demise to two persons, one of whom resides on the premises and the other elsewhere, a service on him who resides on the premises is sufficient for the jury to presume that it reached the other tenant [5]; and where the immediate tenant has underlet, the notice to quit by the landlord must be to the person to whom he demised, and not to the actual tenant in possession, between whom and the landlord there is no privity [6].

As to the person by whom the notice may be given, it has been held that one tenant in common may give notice for his moiety [7], but if there are two or more joint-tenants all must join. A notice given by one on behalf of himself and others, without their authority, is so absolutely void as not to be made good by the subsequent assent of the others [8] (*h*). But

[1] Doe *v.* Calvert, 2 Campb. 388.

[2] Doe dem. Mathewson *v.* Wrightman, 4 Esp. Cas. 3.

[3] By Heath, J. in Denn d. Willan *v.* Walker, Glou. Sum. Ass. 1800, who cited Denn d. Alstone *v.* Waine, C. B. East, 32 G. 3.

[4] Jones dem. Griffiths *v.* Marsh, 4 T. R. 464.

[5] Doe dem. Lord Bradford *v.* Walkins, 7 East, 557.

[6] Roe *v.* Wiggs, 2 N. Rep. 380. Pleasant dem. Hayton *v.* Benson, 14 East, 234.

[7] Cuttings *v.* Derby, 2 Blac. 1075.

[8] Right dem. Fisher *v.* Cothel, 5 East, 491.

(*h*) The principle laid down in the case cited seems to go to this extent, and was so considered in the subsequent case of *King* v. *Woodward*, but it should be observed that the case of *Fisher* v. *Cuthell* was not a mere notice to quit, but a notice to determine a tenancy

But if an agent, who has been appointed by some of the joint-tenants, give the notice, and the others afterwards recognize his authority, and act upon it, that is sufficient; and where a receiver was appointed by the Court of Chancery, and he let the land, and afterwards gave notice to quit, his notice was held sufficient without any such evidence of recognition [1].

[1] Goodtitle dem. King v. Woodward, 3 B. & A. 689.

If there is a subscribing witness to the notice, he must be called or his absence accounted for, although the tenant made no objection at the time of service.

Doe dem. Sykes, bart. v. Durnford, 2 M. & S. 62.

Disclaimer.

In cases where the tenant has absolutely denied the title of his landlord, as if he has attorned to another person, no notice at all is necessary [2]; but when on the death of the original landlord, leaving a will, there were disputes between his heir and devisee as to its validity, and the tenant being applied to by the latter, admitted the title of the original lessor, but refused to pay the devisee, merely on account of the dispute between him and the heir, it was determined by Lord *Kenyon*, at *Nisi Prius*, that this was not such a denial of title as to enable him to maintain an ejectment without any previous notice [3].

[2] Bul. N. P. 96.

[3] Doe dem. Williams v. Pasquali, Peake's Cas. 196.

The defendant may sometimes avoid the effect of this notice to quit, by showing that the lessor of the plaintiff has waved it by some subsequent act; as if he has received [4], or distrained [5], or brought covenant [6], for rent accrued subsequent to the time of quitting mentioned in the notice, or done other acts whereby he has acknowledged the defendant to be his tenant *subsequent to that time*; but the payment of rent *due before*, though made *after* the expiration of the time of quitting, does not avoid the notice [7]; nor will a landlord who has given one notice, and brought

[321]

[4] Goodright dem. Charter v. Cordwent, 6 T. R. 219.

[5] Zouch dem. Ward v. Willingale, 1 H. Blac. 311.

[6] Crompton v. Minshull, East. 32 Geo. 3. Runnington's Eject. 80.

[7] Vide 1 H. Blac. 312.

a tenancy by the landlord or tenant, their heirs, executors, &c. giving six months notice under his, her or their respective hand or hands; and the landlord having devised to three persons, and two only having given the notice, the court appear to have laid particular stress on these words.

Part II.
Mesne Profits moveable under stat. Geo. 4.

an ejectment on it, lose the benefit of it by giving another notice to quit at a subsequent day, under an idea that he should not be able to prove the first [1].

It has hitherto been the practice for the lessor of the plaintiff to be nonsuited if the defendant does not appear, and afterwards to take a verdict against the casual ejector, in all cases whether the ejectment were defended or not, and to bring an action for the mesne profits: but an act of parliament has lately passed which gives further remedies to landlords in ejectment, and enacts, "That whenever it shall appear on the trial of any ejectment by a landlord against a tenant, that such tenant or his attorney hath been served with due notice of trial, the plaintiff shall not be nonsuited for default of the defendant's appearance, or of confession of lease, entry and ouster; but the production of the consent rule and undertaking of the defendant, shall in all such cases be sufficient evidence of lease, entry and ouster; and the judge, before whom such cause shall come on to be tried, shall, whether the defendant shall appear upon such trial or not, permit the plaintiff on the trial, after proof of his right to recover possession of the whole, or of any part of the premises mentioned in the declaration, to go into evidence of the mesne profits thereof, which shall or might have accrued from the day, or expiration or determination of the tenant's interest in the same, down to the time of the verdict given in the cause, or to some preceding day, to be specially mentioned therein; and the jury on the trial, finding for the plaintiff, shall in such case give their verdict upon the whole matter, both as to the recovery of the whole or any part of the premises, and also as to the amount of the damages to be paid for such mesne profits: provided always, that nothing therein contained shall be construed to bar such landlord from bringing an action of trespass for the mesne profits which shall accrue

[1] Doe dem. Williams *v.* Humphreys, 2 East, 237.

1 Geo. 4, c. 87.

accrue from the verdict, or the day so specified therein, down to the day of delivery of possession of the premises recovered in the ejectment."

In cases of *forfeiture*, by breach of the covenants in the lease, the lessor of the plaintiff must first prove the lease, and then the breach complained of. The declaration in ejectment not conveying any intelligence to the defendant of the cause of forfeiture, the defendant, in cases where there are many covenants, is often at a loss to know to which he is to apply his evidence; and, to prevent the inconvenience which this would occasion, the court will sometimes oblige the plaintiff to give the particulars in writing of the breaches he means to give in evidence; and after that he will be precluded from giving evidence of any other [1].

[1] Vide Doe dem. Birch *v.* Phillips, 6 T. Rep. 597.

The most usual cause of re-entry is that for non-payment of rent, the landlord's remedy on which is made much more easy by the stat. 4 Geo. 2, c. 28, for by that statute, if there be a power of re-entry in default of payment, and it be proved "that half a year's rent was due before the declaration was served, and that no sufficient distress was to be found on the demised premises countervailing the arrears then due;" the landlord need not prove all the necessary previous steps which were required by the common law. In this case, he has only to prove the above-mentioned facts, viz. the arrear of rent, and the deficiency of property for a distress after the rent became due, and about the time when the right of re-entry commenced for default of payment [2], and also the time of serving the declaration, which, by that statute, may either be in the usual way, "or in case the same cannot be legally served, or no tenant be in actual possession of the premises (*i*), by affixing

[322]

[2] Doe m. Smelt *v.* Fuchan, 15 East, 286.

(*i*) Vide stat. 11 Geo. 2, c. 19, and 57 Geo. 3, c. 52, which gives a summary remedy to justices of the peace, where the premises are deserted.

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Part II. *On a Forfeiture.*

the same upon any demised messuage; or in case such ejectment shall not be for the recovery of any messuage, then upon some notorious place of the lands, tenements, or hereditaments, comprised in such declaration of ejectment," which is directed to "stand in the place and stead of a demand and re-entry." As to what cases shall be deemed within the statute, it was lately holden by three judges of the King's Bench (Lord *Ellenborough* dissenting), that even if the proviso for re-entry be in case the rent shall be in arrear twenty-one days, *being lawfully demanded*, no demand was necessary; whereas his lordship thought that some demand was necessary, though not the strict formal demand as to time, place, &c. which was required by the common law [1].

In cases not within the statute, viz. where there are sufficient goods to countervail the rent, the landlord is still put to all the formality of proof with which he was burthened by the common law [2]. He must prove a demand by himself, or by some person duly authorized by letter of attorney from him (which should be notified to the tenant, and be ready to be produced if he requires it) of the precise sum [3] which is due, on the very day when the rent is payable to save the forfeiture, at a convenient time before sun-set [4], as if the proviso be for re-entry, if the rent is behind thirty days after the day of payment, the demand must be on the thirtieth or last day. Therefore, a demand of a *larger* or a *less* sum, or on a day *before* or a day *after*, will not support the ejectment.

Where no particular place is appointed, it must be proved that the demand was made on the land, and at the most notorious part of it; as, if there be a dwelling-house, the demand must be at the front door [5]; but, if a particular place be appointed for payment, the demand must be made at that place [6]; and so strict is the law in the case of forfeitures,

[1] Doe dem. Scholefield v. Alexander, 2 M. & S. 525.
[2] Doe dem. Foster v. Wandlass, 7 T. Rep. 117. Vide 7 East, 363.
[3] Fabian v. Winston, Cro. Eliz. 209.
[4] Harg. Co. Lit. 202, a. Wood v. Chivers, 4 Leon. 179. Doe dem. Foster v. Wandlass, ubi supra.

[323]

[5] Co. Lit. 202, a.
[6] Co. Lit. 201, b.

feitures, that it must be proved that the demand of rent was made, though no person was on the land to pay it [1]; while, on the other hand, if it appear that the tenant tendered the rent at any time during the last day, either on the land or elsewhere, it is sufficient on his part to save the forfeiture [2].

[1] 1 Roll. Abr. 458.

[2] Co. Lit. 201, b. &c.

The law leans as much as possible against forfeitures, and therefore where a lease contains a proviso for re-entry, the proof of acceptance of rent accrued subsequent to the cause of forfeiture will furnish a sufficient defence to the action, for, by this act, the lessor waves his right of entry [3]. But it should also be proved, or reasonable evidence given for a jury to presume, that the lessor had notice of the forfeiture at the time he so received the rent, otherwise it is no waver [4]; and it is to be observed, that the receipt of rent, though a waver of a forfeiture, where there is only a proviso for re-entry, does not set up a lease which is entirely void, as if in a lease *for years*, it be provided, that in case of non-payment of rent, or the like, the lease shall be *null and void*, if the lessor make a demand, &c. the lease is absolutely at an end, and cannot be afterwards set up [5]; but in the case of a lease for *life*, the lessor could not determine the lease without entry, and, therefore, the forfeiture may be waved by an act which treats the lessee as his tenant, after notice of the forfeiture, notwithstanding the deed declares that the lease should cease and be void [6].

[3] Goodright dem. Walker *v.* Davids, Cowp. 803. Roe dem. Gregson *v.* Harrison, 2 T. Rep. 425.

[4] Ibid.

[324]

[5] Co. Lit. 205, a.

[6] Vide Williams' Saunders, 287, b.

SECTION IV.

Of the Evidence in Ejectment by Creditors who have a Lien on the Land.

A *Mortgagee* may maintain an ejectment against his mortgagor, immediately after the day of payment; and,

Part II. *Evidence by Creditors.*

and, though the mortgagor may, by statute 7 Geo. 2, c. 20, obtain relief by motion, on certain conditions, yet, on a trial, the proof will be very simple. If the mortgagor be himself in possession, proof of the execution of the deeds will be sufficient, for, as was said before, he cannot set up any title inconsistent with his own deed [1]; but if a third person be in possession, the lessor of the plaintiff should also prove, that the mortgagor was in possession or receipt of rent at the time of the mortgage; and if the defendant's interest commenced previous to the mortgage, that notice to quit has been given to him [2] (*k*); but if the mortgagor, continuing in possession, demise the premises after the mortgage, without the consent of the mortgagee, no notice is necessary [3].

[1] Vide ante, 338.

[2] Vide Birch *v.* Wright, 1 T. Rep. 279.

[3] Keech dem. Warn *v.* Hall, Dougl. 21.

The next case which occurs is that of a creditor who has sued out an *elegit*. He must prove an examined copy of the judgment, and of the award and return of the *elegit*, entered on the roll. If such entry contain the inquisition, it is not necessary to prove copies taken from the *elegit* and inquisition themselves [4], though such evidence was at one time deemed necessary [5]. If by that it appear that more than a moiety is extended, he cannot recover [6]; but it is immaterial whether a moiety of each individual close or tenement, or a moiety of the whole in value be extended [7].

[4] Ramsbottom *v.* Buckhurst, 2 M. & S. 565.

[5] Gilb. L. Ev. 9.

[6] Patton *v.* Purbeck, Salk. 563.

[7] Den dem. Taylor *v.* Lord Abingdon, Dougl. 472. Bul. N. P. 104.

The *conusee* of a *statute merchant*, in case he bring

(*k*) It is said to have been ruled, in *White* v. *Hawkins*, B. N. P. 96, that if a mortgagee give the tenant notice that he wishes only to get into the receipt of the rents and profits, no notice to quit is necessary, though the mortgage were subsequent to the tenant's lease; and in Dougl. 23, Lord *Mansfield* is said to have approved of this decision. But in *Doe* dem. *Dacosta* v. *Walton*, 8 T. Rep. 2, where a creditor by *elegit* brought an ejectment against a tenant under a lease prior to the judgment, having first given notice that he did not mean to disturb the tenant's possession, his object being only to get into the receipt of the rents and profits; the court held, that the legal title must prevail, and that the ejectment could not be supported.

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an ejectment, must prove a copy of the statute, of the *capias si laicus*, extent and *liberate* returned; for though by the return of the extent an interest is vested in the *conusee*, yet the actual possession of that interest is acquired by the *liberate*.

[326]

The same observation applies to these cases as was before made on that of a mortgagee. If the debtor himself be in possession, this formal evidence is sufficient; but when the possession is in a third person, the plaintiff must either show that such third person claims under the debtor, and that the defendant's incumbrance is posterior to his own, or else be prepared with evidence to support the debtor's title [1].

[1] Vide Doe dem. Dacosta v. Walston, note (i).

CHAP. X.

OF EVIDENCE IN THE ACTION FOR MESNE PROFITS.

IN the action for *mesne profits*, against the tenant in possession after judgment in ejectment, the title of the plaintiff, or his lessor, subsequent to the day of the demise in the declaration, cannot be disputed; and, therefore, whether the action be brought in the name of the nominal plaintiff in ejectment, or in that of his lessor, this fact, and that of the plaintiff's possession, are sufficiently established by proof of examined copies of the judgment in ejectment, of the writ of possession, and of the sheriff's return thereon (*a*). And if the action be brought by two, and

[327]

(*a*) Mr. J. *Buller* (N. P. 87.) says, that when the judgment is against the tenant in possession, and the action of trespass is brought against him, it seems sufficient to produce the judgment, without proving the writ of possession executed; and Mr. Serj. *Runnington* (Law Eject. 242.) says, that such is the practice. Both agree that the practice is otherwise where there has been a judgment by default: but the latter author observes, that this piece of evidence does not seem to be necessary in either case, for as the tenant is concluded, by the judgment in ejectment, from controverting the plaintiff's title, he is consequently precluded from

Part II. *Mesne Profits.*

and the declaration in ejectment contain two counts, one on the demise of each, the judgment obtained on such declaration will support the joint action [1].

[1] Chamiere v. Clings, 1 M. & S. 64.

In addition to this evidence, the plaintiff must prove the length of time that the defendant has been in possession of the land, the annual value, or value of the crops taken from it, and the costs of the ejectment, in case they have not been already recovered. He may also, when such fact is specially alleged in the declaration, give evidence of any injury done to the premises, in consequence of the misconduct of the defendant after the expiration of the tenancy.

If the plaintiff seek to recover profits accrued *before* the time of the demise laid in the declaration, he must, in addition to the former evidence, prove his title; and, as the nominal plaintiff has not any title, the action, in such cases, must always be brought in the name of his lessor. The defendant will be at liberty to controvert this title [2]. In like manner when the action for mesne profits is brought against a person who had parted with the possession previous to the action of ejectment, the plaintiff must prove his title [3]; for the recovery in ejectment is no evidence against a person who was not in possession, and, therefore, could not be served with it; and even if recovered against the wife, and an action for the mesne profits be afterwards brought against the husband and wife, such judgment is not admissible as evidence [4]. So where the action is brought against the landlord to the person who was served with the ejectment, as tenant in possession, who suffers judgment by default [5], such judgment is not sufficient with-

[328]

[2] Dacosta v. Atkins, Bul. N. P. 87.

[3] Ibid.

[4] Dunn v. White, 7 T. Rep. 112.

[5] Hunter v. Britt, 4 Campb. 455.

from disputing his possession, which in this possessory action is part of it. The grounds on which the court proceeded in *Astlin* v. *Parkin*, (2 Burr. 667.) appear to warrant this observation; but in the course of the argument of *Compere* v. *Hicks*, 7 T. Rep. 730, the court is reported to have said, "That confession of lease, entry, and ouster, will not enable the party to recover the mesne profits. The plaintiff must have a writ of possession, and then the entry under it will be referred to the time of the title."

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out showing that the landlord had notice of the ejectment.

Where an entry was necessary to avoid a fine, the defendant may, by proof of the fine, prevent the plaintiff from recovering any profits which accrued before the time of the entry, which in such case the plaintiff should be prepared to prove.

Compere v. Hicks, 7 T. Rep. 727.

In cases where the plaintiff does not enter into evidence of title, the defendant's evidence will of course be confined to the value of the profits, and the time of his possession; and if the plaintiff claim profits for more than six years, the defendant must plead the *statute of limitations*, to prevent his recovering any damages for the profits taken previous to that time. This action is now rendered in a great measure unnecessary in the case of landlord and tenant, by the statute 1 Geo. 4, c. 87, referred to, *ante*, c. 9, s. 3.

[329]

CHAP. XI.

OF THE EVIDENCE IN ACTIONS BY AND AGAINST HUSBAND AND WIFE, OR BY A HUSBAND, PARENT, OR MASTER.

SECTION I.

Actions by and against Husband and Wife.

IN cases where the husband and wife are joint *plaintiffs*, the marriage, if put in issue, should be proved by an examined copy of the register, or by some person present at the time; but when they are *defendants*, proof that they cohabited together as husband and wife is conclusive upon them; for a man who permits a woman to pass in the world as his wife, will not afterwards be permitted to say that she is not so.

Norwood v. Stevenson, Andr. 237. Vide ante, 25.

But

Part II. *Action by Husband and Wife.*

But when only the *general issue* is pleaded, whether in *assumpsit*, case, or trespass, there is no necessity to prove the marriage. If, therefore, husband and wife sue for a debt due to the wife before the marriage, or for an assault committed upon her, and the defendant plead the *general issue*; the plaintiffs will not be obliged to give further evidence of their relationship to each other than is sufficient to show that the woman who sues as the wife of *A.* is the person with whom the contract was made, or on whom the assault was committed; and the defendant will not, on this issue, be at liberty to dispute the marriage.

[330]

Dickenson & Wife *v.* Davis, 1 Stra. 480.

SECTION II.

Actions by Husband alone.

Sect. 2. *Crim. Con.*

WHEN the husband sues alone to recover damages, in consequence of the defendant's misconduct towards his wife, he must strictly prove the marriage, although only the *general issue* be pleaded; for the plea of not guilty, in this case, puts the facts of the marriage in issue; as, without that fact, the defendant has committed no injury to the plaintiff individually.

Morris *v.* Miller, 4 Burr. 2057.

In actions for *criminal conversation*, therefore, the plaintiff must prove the actual marriage and identity of himself and his wife. No reputation, nor even an admission by the defendant that he had committed adultery with the plaintiff's *wife*, will be sufficient in this case. But when the marriage is proved by the register, the parties may be identified by any other evidence which satisfies the jury; as the proof of their hands-writing subscribed to the register, or the circumstance of their afterwards giving a wedding-dinner,

Birt *v.* Barlow, Dougl. 162.

dinner, and presiding at it as the persons married; and this, although the subscribing witnesses present at the marriage are living. In the case of sectaries, who marry contrary to the usual ceremonies of the church, a marriage according to their rites will be sufficient[1].

[331]

The ground of the action being the loss of the wife's affection and society, all evidence which tends to show that they lived affectionately together, is proper to be adduced on the part of the plaintiff. Even letters from the wife to her husband may be admissible under some circumstances, as where, during his absence, she writes letters of affection to him, and it is clearly shown that such letters were written before the defendant became acquainted with her[2]; but unless the latter fact be clearly made out, the letters will not be admitted[3]. If the plaintiff has lost any expectations of fortune in consequence of the seduction of his wife, it will also be proper evidence on his part[4], as will, in many cases, the rank and circumstances of the defendant.

The defendant will be permitted to show in mitigation of damages, that the wife was a woman of loose conduct, and one whose society was but of little value. So if the husband has ill-treated his wife, or connected himself after his marriage with other women, this also is proper matter to be given in evidence by the defendant, and generally has considerable effect in reducing the damages. Indeed, the circumstance of the plaintiff's connection after marriage with other women, was holden by Lord *Kenyon* in two cases[5], to furnish a defence to the action; but Lord *Alvanley*, in a subsequent case[6], held, that it only went in mitigation of damages. So the defendant may prove that the plaintiff consented to his wife's adultery with the defendant or with other men[7]; and if this be satisfactorily proved,

[332]

[1] Woolston v. Scott, Bul. N. P. 28. Vide Ganer v. Lady Lanesbro', Peake's Cas. 17.

[2] Edwards v. Cooke, 4 Esp. Cas. 39.

[3] Trelawney v. Coleman, 1 B. & A. 90.

[4] Vide Winsmore v. Greenbank, Bul. N. P. 78.

Vide ante, 7.

[5] Wyndham v. Lord Wycomb, 4 Esp. Cas. 16; and Street v. Marquis of Blandford, there cited.

[6] Bromley v. Wallace, Ibid. 237.

[7] Smith v. Allison, Bul. N. P. 27. Hodges v. Wyndham, Peake's Cas. 39.

Part II. *Action for Crim. Con.*

the action will fail altogether, for a husband who has so prostituted his wife, will not be permitted to sue as a plaintiff in a court of justice. It should here be observed, that great caution is necessary in the introduction of evidence of this description, for unless most clearly and satisfactorily made out, it will always much aggravate instead of diminishing the damages. In one case, where the husband and wife were parted by articles of separation, it was determined, by the Court of King's Bench, that this circumstance alone was a bar to any action for adultery, subsequently committed[1]; but, in a very late case, the propriety of this decision was much doubted[2].

[1] Weeden *v.* Timbrel, 5 T. Rep. 357.
[2] Chambers *v.* Caulfield, 6 East, 244.

Action for harbouring Wife.

The action for harbouring a wife, who has eloped from her husband, is frequently brought against some relative of the wife, to whom is not imputed any criminal feeling towards her. In this case the conduct of the husband and wife towards each other will form the principal, but not the only subject of inquiry; for to maintain the action, it must be shown that the defendant obstinately harbours her when he knows that she ought to be under the coercion of her husband. It is therefore permitted to him, for the purpose of disproving this fact, to show not only actual ill-treatment by the husband, but any representation of the wife at the time she came to his house and sought his protection. A representation made by her at a subsequent time is not admissible.

Philp *v.* Squire, and Winsmore *v.* Greenbank, ante, 21.

[333]

SECTION III.

Actions by a Parent or Master.

Sect. 3. *Actions by Parent or Master.*

A PARENT may maintain an action for any assault upon, or injury done to his child, whilst such child remains part of his family. The strict ground of the action

action is the loss of the service which the child might have performed for the parent; and though it has been holden, that it is not necessary to show that in fact the child was accustomed to perform any menial office, or other service in the family, but that it is sufficient if he or she were living in the parent's house, and under his protection[1], yet it must be proved that the child did so reside. Therefore a parent, whose daughter has a permanent and fixed residence in another family, cannot maintain any action against the person who seduces her, though she be under age[2]. In this case, however, the person with whom she resides may maintain the action[3]. When the daughter resides with her parent, though she be above twenty-one years of age, he may maintain the action[4]; and so he may also if her general residence be at his house, and she is seduced while on a visit at the house of another person with his consent[5].

[1] Jones v. Brown, Peake's Cas. 253.

[2] Dunn v. Peel, 5 East, 45.

[3] Fores v. Wilson, Peake's Cas. 55. Edmonson v. Machel, 2 T. Rep. 4. Irvin v. Dearman, 11 East, 24.

To support the action, the girl herself may be a witness, and prove any facts or circumstances attending the seduction, except such as would support another action at her own suit for a breach of promise of marriage[6]. The defendant on his part may, as in the case of adultery, prove the loose character of the girl, or the misconduct of the parent himself in voluntarily permitting an illicit connection to be formed between the defendant and his daughter, which latter fact will destroy the right of action altogether[7].

[4] Booth v. Charlton, cor. Wilson, J. cited 5 East, 47. Bennett v. Alcott, 2 T. Rep. 156.

[5] Johnson v. M'Adam, 5 East, 47.

[6] Vide ante, 162, pl. 11.

[7] Reddie v. Scoolt, Peake's Cas. 240.

The action for seducing or harbouring an apprentice or hired servant, materially differs from those for adultery, or debauching a daughter[8]. The act of the defendant, in these latter cases, being itself illegal, no proof is required of his knowledge of the relationship which subsisted between the plaintiff and the person seduced; but to support an action

[8] Fores v. Wilson, ubi sup.

Part II. *Actions by Parent or Master.*

for enticing or harbouring an apprentice or hired servant, it must be proved that the defendant knew at the time he committed the injury which is complained of, that the person in respect of whom the action is brought, was the apprentice or servant of the plaintiff. To sustain this action therefore, the plaintiff must, in the first place, prove the contract between himself and the person seduced, and then either that the defendant, knowing of such contract, enticed him from the plaintiff's service, or else that the defendant harboured the servant after regular notice of his contract with the plaintiff, and a requisition to the defendant to deliver him up, or not to harbour him any longer.

Fawcet *v.* Beavres, 2 Lev. 63.

[335]

CHAP. XII.

OF THE EVIDENCE IN CASES OF BANKRUPTCY.

SECTION I.

In Actions by and against the Assignees.

Ch. XII. s. 1. *Action by or against the Assignees.*

IF assignees of a bankrupt bring an action of *trover* for the goods of the bankrupt, or *assumpsit* on a promise made to him before his bankruptcy, or on an implied promise to themselves as assignees afterwards, and the defendant pleads the *general issue*; the plaintiffs must prove not only property in the goods to support their action of *trover*, or the consideration to support the promise, but also the trading of

Bul. N. P. 37.

Abbot *v.* Plumbe, Dougl. 205.

of the bankrupt, the act of bankruptcy (*a*), the petitioning creditor's debt, the commission and assignment. The commission generally describes the bankrupt as carrying on some particular trade, but this does not bind the plaintiff to prove him of the trade so described; for if the commission is against the proper person, the plaintiff may prove the trading in any article, though not described in the commission [1]. The petitioning creditor's debt must be proved by the same kind of evidence as would be required in an action against the bankrupt himself; if it is by bond, the subscribing witness must be called [2]. If the petitioning creditor is an executor, the probate must be produced; or if he is himself assignee of

[1] Hale v. Small, 2 Bro. & B. 25.

[2] Abbot v. Plumbe, Dougl. 205.

(*a*) To show *quo animo* the bankrupt left his house, his declaration at the time as to his fear of an arrest may be proved: but any declaration at another time, when no act is done by him, is not evidence. *Ambrose* v. *Clendon*, Cas. temp. Hardw. 267. *Bateman* v. *Bailey*, 5 T. Rep. 512.

Where a trader having drawn a bill of exchange, afterwards and before it became due said it would not be paid, such declaration was received to dispense with the want of notice of the subsequent dishonour, though previous to making it the trader had committed an act of bankruptcy, which was afterwards made the ground of a commission. *Brett, Ass. &c.* v. *Levett*, 13 East, 218.

In the above case it appears that the Court of King's Bench held the bankrupt's declaration, after the act of bankruptcy, to be evidence against a third person who disputed the commission; and in a subsequent case, where the bankrupt brought an action against his assignees, the same court held that the circumstance of the bankrupt and his petitioning creditor, having attended before the commissioners at their second meeting, and there produced their accounts, when the bankrupt objected to part of the demand, and the commissioners ticked off such items as he allowed, and struck a balance, though it could not be considered as an award or adjudication by the commissioners, either as arbitrators appointed by the parties, or in their official character of commissioners, was still evidence to be left to the jury of an admission by the bankrupt. *Jarvet* v. *Leonard*, 2 M. & S. 265. But the Court of Common Pleas determined, that in an action by the assignees against a third person, even an account signed by the bankrupt, charging himself with a balance a day before the act of bankruptcy, was not admissible to prove the petitioning creditor's debt, without positive proof that the accounts had been allowed before the act of bankruptcy. *Heare* v. *Coryton*, 4 Taunt. 560.

Part II. *Action by or against the Assignees.*

another bankrupt, who was the creditor of the bankrupt in the particular case, he must give the regular proof of the trading and bankruptcy of both these persons [1].

[1] Doe dem. Mawson v. Liston, 4 Taunt. 741.

The regular proof of the assignment will be its production, and proof by the subscribing witness; and if a former assignee has been removed and a new one appointed, the assignment from the old assignee to the new one must be proved in like manner; for the Lord Chancellor's order for the purpose is not sufficient to take the property out of the old assignee, and vest it in the new one [2]. But though the production and regular proof of the assignment is in general required, yet where the defendant had treated with the plaintiff as the assignee, accounted with him as such, and paid part of the debt, that fact was held to be *prima facie* evidence of the assignment, and to dispense with formal evidence to prove it [3]. The mode of proof in these cases is rendered much more easy by a late act of parliament [4], by which it is enacted, "That in any action by or against any assignee of any bankrupt, the commission of bankrupt, and the proceedings of the commissioners under the same, shall be evidence to be received of the petitioning creditor's debt, and of the trading and bankruptcy of such bankrupt, unless the other party in such action shall, if defendant, at or before the time of his pleading to such action, and if plaintiff, before issue joined in such action, give notice in writing to such assignee, that he intends to dispute such matters or any of them; and where such notice shall have been given, if such assignee shall at the trial prove the matter so disputed, or the other party shall at the trial admit the same, the judge before whom the cause shall be tried, shall, if he shall see fit, grant a certificate that such proof or admission was made upon such trial, and such assignee

[2] Bloxam v. Hubbard, 5 East, 407.

[3] Dickenson v. Coward, 1 B. & A. 677.

[4] 49 Geo. 3, c. 121, s. 10.

assignee shall be entitled to the costs, to be taxed by the proper officer, occasioned by such notice; and such costs shall, in case the assignee shall obtain a verdict, be added to his costs; and if the other party shall obtain a verdict, shall be set off or deducted from the costs which such other party would otherwise be entitled to receive from such assignee." It is to be observed, that the act of parliament has made the proceedings under the commission "evidence to be received" of the facts proved before the commissioners, but has not said that they shall be conclusive. It has therefore been held[1], that though a party who has not given notice of his intention to dispute the facts necessary to support the commission, cannot call on the other side to give further evidence than the production of the proceedings, yet that he is not precluded from giving evidence on his part to contradict the fact so proved.

[1] Mills *v.* Bennett, 2 M. & S. 556.

The act of parliament extends not only to those cases in which the assignees are themselves parties as plaintiffs or defendants, but also to those where the party must necessarily deduce his title under the commission[2]; but in actions between third persons, when the validity of the commission comes only incidentally into question, the law remains the same as before the statute, and the several facts necessary to establish the bankruptcy must be proved by the ordinary evidence[3]. A person who has proved his debt under the commission, is not thereby precluded from disputing the petitioning creditor's debt, or calling the same evidence as any other third person[4].

[2] Symonds *v.* Knight, 3 Campb. 30.

[3] Doe dem. Mawson *v.* Liston, 4 Taunt. 741.

[4] Rankin *v.* Horner, 16 East, 191.

The modes of assigning the personal and real property of the bankrupt, differ not only in form, but materially in their effects on those different species of property. In the former the commissioners merely execute the deed, and that by relation vests all property in the assignee from the time of the act of

Part II. *Action by or against the Assignees.*

bankruptcy. But the freehold property of the bankrupt can be transferred only by bargain and sale enrolled in one of the king's courts of record; and though when so enrolled, it defeats all grants made after the bankruptcy, yet it vests the estate in the assignees only from the time of the enrolment, so that a demise by them in ejectment must be laid after that time. The enrolment being thus made a part of the title, the assignee must prove that as well as the execution of the deed; but the officer's endorsement, or an examined copy of it, is sufficient to prove not only the fact of enrolment, but the time it was made.

Doe dem. Esdaile v. Mitchel, 2 M. & S. 446.

Rex v. Hopper, 3 Price, 495.

But in cases where the assignees themselves make a contract with a third person, and have occasion to sue upon it, it seems to be unnecessary for them to name themselves assignees in the declaration, or to give evidence to prove that they fill that relation.

Vide Evans v. Mann, Cowp. 569.

SECTION II.

In Actions by and against the Bankrupt.

Sect. 2. *Action by Bankrupt.*

WHERE a person has been found a bankrupt, and brings an action against the messenger or assignees for the goods taken, the defendant must be prepared with evidence to prove the trading, &c. as in the other case, notwithstanding the bankrupt has surrendered to his commission, and passed his examination.

Mercer v. Wise, 3 Esp. Cas. 316.

But when the bankrupt is sued for any debt from which he is discharged by his certificate, and pleads such discharge (*c*), no further evidence is required on

5 Geo. 2, c. 30, s. 7.

(*c*) When a bankrupt who has obtained his certificate is afterwards sued for any debt due before his bankruptcy, the statute gives

on his part, than the production of the certificate allowed by the Lord Chancellor; and the creditor may avoid it by showing that it was obtained *unfairly* and by fraud, or else that there has been a concealment by the bankrupt of effects to the value of 10*l.* As to what shall be deemed an unfair or fraudulent obtaining of a certificate, it has been holden, that if money be given either with the bankrupt's privity or without to any one creditor to induce him to sign it[1], or to withdraw a petition which he has presented against it[2], the certificate is void. But if the plaintiff prove an omission to account for effects amounting to 10*l.* the bankrupt may prove that it was not wilful or fraudulent[3].

[337]

[1] Robson v. Calze, Dougl. 228. Holland v. Palmer, 1 Bos. & Pul. 95.

[2] Sumner v. Brady, 1 H. Black. 647.

[3] Cathcart v. Blackwood, Cul. B. L. 384. (*d*).

By another clause, in the same act of parliament, it is enacted, "that the act shall not give any *privilege*, benefit, or advantage, to any bankrupt, who shall, for or upon marriage of any of his children, have given, advanced, or paid, above the value of 100*l.* unless he or she shall prove *by his or her books fairly kept*, or otherwise upon *his or her oath, or (being a Quaker) affirmation*, before the major part of the commissioners in such commission named and authorized, that he or she had at the time thereof over

5 Geo. II. c. 30. s. 12.

gives a general form of plea that he was discharged as a bankrupt, and that the cause of action accrued before such time as he became bankrupt. This plea concludes to the country, and on the *similiter* being added, all the special matter either to support or defeat the certificate may be given in evidence without further pleading on either side. *Alsop* v. *Price*, Dougl. 160. *Hughes* v. *Morley*, 1 Barn. & Ald. 22. It was for some time doubted whether this general plea was given to the defendant in cases where the certificate was not completed till after the commencement of the action, (vide *Tower* v. *Cameron*, 6 East, 413); but it is now settled that the defendant may so plead if the certificate be allowed any time before plea pleaded, though after the commencement of the suit, provided he were a bankrupt before. *Harris* v. *James*, 9 East, 82.

(*d*) This case is mentioned in Co. B. L. 284, but no notice is there taken of this point.

and

Part II. *Action against Bankrupt.*

and above the value so given, &c. remaining in goods, wares, debts, ready money, or other estate, real or personal, sufficient to pay and satisfy unto each and every person to whom he or she was any ways indebted, their full and entire debts; or who hath or shall have lost in any one day the sum or value of 5*l.* or in the whole the sum or value of 100*l.* within the space of twelve months next preceding his, her or their becoming bankrupt, in playing at or with cards, tables, dice, tennis, bowls, billiards, shovel-board; or in or by cock-fighting, horse-races, dog-matches, or foot-races, or other pastimes, game, or games whatsoever; or in or by having a share or part in the stakes, wagers, or adventures; or in or by betting on the sides or hands of such as do or shall play, act, ride, or run, as aforesaid; or that within one year before he or she became bankrupt shall have lost the sum of 100*l.* by one or more contracts for the purchase, sale, refusal, or delivery, of any stock of any company or corporation whatsoever, or any parts or shares of any government or public funds or securities, where every such contract was not to be performed within one week from the time of making such contract, or where the stock or other thing so bought or sold, was not actually transferred or delivered, in pursuance of such contract."

[338]

There appears to be a remarkable difference in the words of these two sections in the same act of parliament; by the first, it is expressly enacted, that the certificate shall be sufficient evidence for the defendant, and a verdict shall pass for him, "unless the plaintiff can prove the *certificate* was *obtained unfairly* and by fraud, or unless the plaintiff shall make appear any concealment, &c." whereas by the other section it is only provided that nothing in the act shall extend, or give or grant any *privilege, benefit,*

or

[339]

or advantage, to a bankrupt falling within the description contained in it. It has been generally supposed, that in the cases mentioned in the 12th section, the certificate is void, and that the defendant may be precluded from his discharge by proving the circumstances at *Nisi Prius*. Several instances have occurred where the nature of the gambling in which the bankrupt has been engaged, has been examined into in a court of law, in order to determine whether the certificate was not thereby avoided; and in cases within that section verdicts have passed for the plaintiff. But, perhaps, it may be worth consideration, whether this clause, so differently worded as it is from the other, was meant to extend further than to give authority to the Lord Chancellor and the commissioners to refuse the allowance in the cases mentioned in it. In one instance mentioned in that section, a mode of inquiry is pointed out, quite contrary to the rules of evidence in a court of law; if the bankrupt has given more than 100*l.* to either of his children, he may prove by *his books* fairly kept, or on *his oath or affirmation before the commissioners*, that he then had sufficient to pay all his creditors; an advantage which he could never have in an action against himself; and it should seem, that if the legislature had meant that the misconduct mentioned in that section should have the same effect as a concealment to the value of 10*l.* they would have included those cases in the same section, and not have provided for them by a different clause couched in very different language (*e*.)

Vide Co. B. L. last ed. 464. Lewis *v.* Piercy, 1 H. Black. 29. Bateson *v.* Hartsink, 4 Esp. Cas. 43.

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(*e*) This point was made in *Hughes* v. *Morley*, 1 Barn. & Ald. 22, where, as far as concerns the provision in the case of money lost at play, it was held that this clause of the act might be taken advantage of on the usual replication at *Nisi Prius*. As to the provision in the case of more than 100*l.* given to a child in marriage, some difficulty seems to have been felt by the judges; *Abbott, J.* and

Part II. *Action against Bankrupt.*

The statute 24 Geo. 2, c. 57, s. 9, has made another provision in aid of the 7th section of the former act of parliament, by enacting, that where any person shall swear to any fictitious debt, and shall sign the certificate in respect thereof, that in such case, unless the bankrupt shall before such time as the commissioners shall have signed the certificate, by writing by him signed and delivered to one or more of the commissioners or assignees, disclose the fraud and object to the reality of the debt, such certificate shall *be null and void to all intents and purposes*; and such bankrupt shall not in such case be entitled to be discharged from his debts, or to have or receive any of the *benefits or allowances* given by the former act. In a case of this kind the plaintiff must be prepared to prove that the debt was fraudulent, and the bankrupt must show that he gave the notice required by the act. Lord *Kenyon* held that even the petitioning creditor's debt might be impeached at *Nisi Prius* for the purposes of this clause.

[340]

Bateson *v.* Hartsink, 4 Esp. Cas. 43.

Another case, in which the effect of the certificate may be partially avoided by the creditor, is where a commission issues against a person who has been a bankrupt, or compounded with his creditors, or discharged as an insolvent debtor, and has not paid, or his estate is not in a condition to pay, fifteen shillings in the pound under the second commission. In this case his future effects continue liable, and even persons who had signed his certificate might, before the late act of parliament, have maintained actions

[341]

49 Geo. 3, c. 121.

and *Holroyd*, J. seem to have thought that the whole of this inquiry, viz. the ability of the bankrupt at the time he gave the money, could not be entered into at *Nisi Prius*, but that it was competent for the plaintiff to prove the fact of more than 100*l.* being given then, and that the defendant might avoid the effect of that evidence by showing the amount of his property before the commissioners; neither of the judges explain how the verdict is to be taken in the mean time.

against

against him; but since that statute, it should seem that the mere proving a debt under the second commission is an election within its provision, which deprives the creditor of his remedy by action in the cases excepted by the statute of 5 Geo. 2. It is clearly holden that it does so in cases where the bankrupt having been in that situation, or compounded with his creditors before, afterwards paid the full amount of their debts.

Read *v.* Sowerby, 3 M. & S. 78.

If the plaintiff produce the first commission and the proceedings under it (*f*), and prove that the defendant submitted to it, that will be sufficient without further evidence. After which it should seem that it will be incumbent on the defendant to prove that his estate is sufficient to pay fifteen shillings in the pound under the second commission. But it is clearly settled that if the plaintiff give any evidence to show a probability that the estate will not produce that sum, he may maintain his action at any time, and is not obliged to wait until the expiration of the time allowed for making the dividend.

Jelfs *v.* Ballard, 1 B. & P. 467.

The statute in this case giving judgment against the future effects of the bankrupt only, there seems to be some difficulty in taking such judgment, merely on the *similiter* being found for the plaintiff. We have before seen it laid down as a general rule, that all matter which is to avoid the certificate may be

(*f*) In *Bateson* v. *Hartsink*, cited above, the plaintiff, in order to show that the defendant had concealed to the value of 10*l.* served the solicitor under the commission with a *subpœna duces tecum* to produce the proceedings under the commission. But Lord *Kenyon* is reported to have said, that he was not only not bound to produce them, but that it would be criminal in him to do it. They were not his papers, but those of his clients, the assignees of the bankrupt's estate. If the plaintiff wanted them he should apply to the Lord Chancellor to have them enrolled, and then use a copy as evidence. But in a subsequent case Lord *Ellenborough* said that he considered the production as a public duty. *Pearson* v. *Fletcher*, 5 Esp. 90; and see *Corson* v. *Dubois*, 1 Holt, 239; and *Cohen* v. *Templar*, 2 Starkie, 260, accord.

given

Part II. *Action against Bankrupt.*

given in evidence on such a replication, and such, I believe, has been the practice in these cases. The only case that I am aware of, in which an attempt was made to introduce special pleading, failed, because the plaintiff prayed judgment generally, instead of against the future effects only; but the court also held the replication to be bad, because it concluded with a verification when the plea concluded to the country, thereby intimating that the *similiter* only should have been replied.

Wilson *v.* Kemp, 2 M. & S. 549.

The before-mentioned cases make the certificate void, or restrain the extent of its operation *ab initio*, but the bankrupt may by his own voluntary act also deprive himself of the benefit of it; and, therefore, if it be proved that he promised to pay the debt after he had obtained his certificate, though no new consideration is shown, such promise will bind him, and may be given in evidence on a count founded on the original consideration[1]. But in a case[2] where the promise was conditional to pay when he should be able, it was ruled by *Gould* and *Heath*, Justices, contrary to the opinion of Lord *Loughborough*, C. J. that evidence must be given of his ability, though probably his general appearance and credit would be deemed sufficient to establish this fact.

[342]

[1] Williams *v.* Dyde, Peake's N. P. 68.

[2] Vide Besford *v.* Saunders, 2 H. Bl. 116.

As to the persons who are competent to give evidence in cases of this nature, *vide ante*, Part I. p. 163.

CHAP. XIII.

OF THE EVIDENCE IN ACTIONS BY AND AGAINST AN EXECUTOR OR ADMINISTRATOR.

SECTION I.

In Actions by an Executor or Administrator.

Ch. XIII. s. 1. *Action by Executor, &c.*

[343]

WHEN an action is brought by an executor or administrator on a cause of action arising in the life-time of the deceased, and the defendant pleads only the general issue thereto, it is sufficient for the plaintiff to prove the same facts as must have been adduced in evidence by the testator or intestate, had the action been brought by him. The plaintiff need not on this issue produce the probate or letters of administration to the jury[1], nor will the defendant be permitted to show that they do not in fact exist, or that they are void for want of a proper stamp[2]. To entitle himself to do this, it is necessary for the defendant to traverse their existence by the plea of *ne unques executor*, or *ne unques administrator*, and then the very production of the probate or letters of administration is sufficient evidence on the part of the plaintiff; and they can only be avoided by the defendant for the causes which have been already stated[3].

[1] Mearsfield *v.* Marsh, 2 Ld. Raym. 824.

[2] Thynne *v.* Protheroe, 2 M. & S. 553. 1 Sid. 350.

[3] Vide ante, 80.

But when the plaintiff sues for a wrong done to himself after his testator's or intestate's death, as in trover for goods converted after that time; or ejectment for lands in which the deceased had a term; the plaintiff must (unless he has himself had such an actual possession as is *prima facie* evidence of title) not only give evidence of the title of the deceased, but also produce the probate or letters of administration,

Mearsfield *v.* Marsh, ubi sup.

Vide post, 396, note (*m*).

Part II.
Action by Executor, &c.
General Issue.

tration, or the book of the Ecclesiastical Court wherein they are entered; for without this evidence he does not show that he is entitled to the thing in dispute. The general issue in this case puts in issue every fact necessary to constitute the plaintiff's title; and if on production the letters of administration appear to be void for want of a sufficient stamp, or on account of their being *bona notabilia*, the defendant will succeed on that plea [1].

[344]

[1] Hunt *v.* Stevens, 3 Taunt. 113. Ante 71.

Statute of Limitations.

If the defendant plead the Statute of Limitations, and he has in fact acknowledged the debt within six years, but after the death of the testator, the plaintiff cannot give this in evidence, unless the declaration contain counts on a promise to himself.

[2] Sarel *v.* Wine, 3 East 409.

SECTION II.

In Actions against an Executor, &c.

Sect. 2.
Action against Executor.
General Issue.

THE general issue in this case also merely disputes the cause of action against the deceased, and not the character or liability of the defendant. If, therefore, the defendant contend that he is not chargeable as executor, or that he has fully administered the goods of the testator, he must plead *ne unques executor*, or *plene administravit*.

On the first of these pleas the plaintiff must prove either that the defendant has been appointed executor and proved the will, or else that he has made himself liable as such by intermeddling with the goods of the deceased. To prove the first fact, an examined copy of the entry in the proper book of the Ecclesiastical Court of probate having been granted to him [1], is sufficient without any notice to him to produce the probate.

[1] Davies *v.* Williams, 13 East, 232. Vide Garret *v.* Lister, 1 Lev. 25. Peaselie's Cas. Ib. 101.

Ne unques Executor.

probate *(a)*. But the more usual evidence on this issue is the circumstance of the defendant's intermeddling with the goods; and any intermeddling by a stranger, however slight, makes him executor *de son tort*, or, in other words, is evidence against him that he sustains the character of executor, and estops him from saying to the contrary. Thus, if a man take a fraudulent bill of sale of the goods of his debtor, and having suffered him to continue in possession, after his death possess himself of the goods [1]; or if *A.* desire *B.* to sell the goods of the deceased, who does so and pays *A.* the money, both the creditor and *A.* in these cases make themselves executors *de son tort*, and may be sued generally as executors by the creditors of the deceased [2].

Vide 2 T. Rep. 97. 597.

[345]

[1] Edwards *v.* Harbin, 2 T. Rep. 587.

[2] Padget *v.* Priest, 2 T. Rep. 97.

Plene administravit.

Supposing, therefore, the defendant properly sued as executor, the plaintiff on proving his debt will be entitled to recover, unless the defendant has pleaded *plene administravit*. This plea is either general, or special as to all the effects except goods to a certain amount, which are chargeable with debts of a higher nature, contracted by the testator in his lifetime, or with judgments recovered by other creditors against the defendant as his executor.

In the first of these cases, viz. the general plea of *plene administravit*, the plaintiff may either reply that the defendant had goods at the time of exhibiting the bill, or state the day when the writ was actually sued out, and served on the defendant, and that the defendant had goods unadministered at that day.

(*a*) In *Elden* v. *Keddel*, 8 East, 187, it was determined, that even *for* the party claiming under the letters of administration, the original books of acts directing letters of administration to be granted with the surrogate's fiat for the same, was sufficient evidence of title without producing the letters of administration; and in *Gorton* v. *Dyson*, 1 B. & B. 219, the court of C. P. held, that the production of the original will (by an officer from the Spiritual Court), on which there was an endorsement of probate having been granted to the defendant, was evidence against him of the contents of the will.

Part II.
Plene administravit.

[346]

The only difference in the effect of these two replications is, that on the first the plaintiff must prove that the defendant had goods unadministered at the day whereon the action appears by the record to have been commenced, and must allow all payments of equal degree with his own debt made previous to that day: whereas by the other he entitles himself to charge the defendant with all goods which the defendant had when the writ was served.

Corbet's Case, 1 Leon. 312.

In either case the *onus* lies on the plaintiff, who must prove that the defendant had assets at the time alleged. To make out this fact he must show that the defendant possessed himself of goods or received monies belonging to the testator, or that he might have so done without gross negligence on his part; barely proving an admission by the defendant that the debt was a just one, and should be paid as soon as he could [1], or a submission of the amount of the debt to arbitration [2], or the payment of interest on a bond [3], will not be sufficient to charge him with assets. In many cases it becomes necessary for the plaintiff to cite the defendant in the Ecclesiastical Court to exhibit an inventory, or to file a bill in equity against him for a discovery, before he can proceed to trial on this issue; and the inventory so exhibited, or the answer put in to the plaintiff's bill, will be *prima facie* evidence against the defendant to the amount of all goods or debts mentioned in it, and put it on him to show that the latter were desperate [4] *(b)*. We have

[1] Headsley *v.* Russel, 12 East, 232.
[2] Pearson *v.* Henry, 5 T. R. 6.
[3] Cleverley *v.* Brett, there cited.

[4] Smith *v.* Davis, B. N. P. 140.

[347]

(*b*) It is said in *Shelley's* Case, Salk. 296, that all *sperate* debts mentioned in the inventory shall be counted assets, unless a *demand and refusal* be proved. This expression I conceive must mean, that the executor has really attempted *bonâ fide* to obtain payment, and not made a mere formal demand on the debtor; for in Wentw. Off. Ex. 160, it is said, that "if the executor be of secret assent to the embezzlement of goods, whereof even the forbearance to sue for the recovery of them, or the value in damage, if it be known where they or the embezzlers be, is a shrewd evidence or proof; then shall the executor be adjudged an haver of

have before seen the method of proving an answer. To establish an inventory the defendant's signature to it should be proved; and if the goods mentioned in it are undervalued, the plaintiff may give evidence of that fact[1], or, I conceive, the fact of the defendant having other goods not mentioned in it.

[1] Wilborne *v.* Dewsbury, Bul. N.P. 140.

As to what effects shall be deemed assets, it has been holden, that for a lease[2] which the defendant has not sold, he shall be charged to the extent of its value; and if the defendant has actually made money of a thing which came to him from the testator, though it was quite uncertain whether any value could be attached to it or not, he shall be chargeable to the creditor to the amount of the money so made: as where an executor sold the goodwill of the deceased's trade, Lord *Kenyon* held it to be assets in his hands[3].

[2] Ibid.

[3] Worral *v.* Hand, Peake's Cas. 74.

The defendant being thus charged with assets, must prove, that before the day mentioned in the replication, he had applied them in satisfaction of the testator's debts of equal degree with that of the plaintiff. In general, no debt of a degree inferior to it will be allowed as an administration of the effects, unless paid before notice of the plaintiff's debt; and where a judgment recovered on a simple contract debt is pleaded to an action on a bond, it must be stated to have been recovered before the defendant had notice of the bond[4]. But the case of a judgment recovered against the testator, which is not docketted, is an exception to this general rule, the stat. 4 & 5 W. & M. c. 20, having required that step to make the judgment of more weight than a simple contract debt against an executor or administrator: in this case, therefore, the plaintiff should

[348]

[4] Sawyer *v.* Mercer, 1 T. Rep. 690.

of them, and so stand charged as having them, for *pro possessore habetur, qui dolo desiit possidere.*" See also *Lawson* v. *Copeland*, 2 Bro. C. Cas. 156.

Part II. *Plene administravit.*

be prepared to prove the docket[1]. The defendant, on the general plea of *plene administravit*, is also entitled to deduct from the assets such money as he has paid for the probate or letters of administration, and for the expences of the funeral: the latter expence, in the case of an insolvent estate, used generally to be estimated at 5*l.*; for in strictness nothing is allowable but the coffin, ringing, the parson, clerk, and bearers fees[2].

[1] Hickey *v.* Hayter, 6 T.R. 324.

[2] 2 Salk. 296. Bul. N.P. 143.

To show that the estate has been properly applied, the defendant must not only prove payment of sums of money to third persons, but must also prove that the persons to whom such payments were made were creditors of the deceased. In actions on simple contract this may be proved by the creditor himself, who having no further interest after payment of the money, is a good witness; and this whether his debt were by simple contract or specialty[3]. But when the payment of a bond debt is set up in answer to an action also on a bond, the defendant must, I conceive, call the subscribing witness to prove the execution of the instrument, otherwise there is no legal proof that the debt paid was of equal degree with that sued for. In this case of a bond, if it appear that the defendant had assets in his hands to have paid it, and that he neglected to do so, he will not be allowed the interest incurred by his own laches[4].

[3] Kingston *v.* Grey, 1 Lord Ray. 745.

[349]

[4] Sanderson *v.* Nichol, 1 Show. 81.

The defendant may also prove on this plea, that, being but an administrator during a limited time, as *durante minori ætate* of an infant executor (to show which the letters of administration should be produced) he had at the expiration of the time, and before the commencement of the plaintiff's action, delivered over the assets remaining in his hands to the executor[5]; and an executor *de son tort* may in like manner prove that he had delivered them[6] to the rightful

[5] 1 Mod. 174.

[6] Curtis *v.* Vernon, 3 T.Rep. 587.

rightful administrator before the action was commenced. But where there are two executors, and one receives a sum of money due to the testator, and pays it over to his co-executor for the express purpose of paying the plaintiff's debts, he cannot avail himself of the payment, but is personally liable, in case his co-executor misapplies the money[1]. Lastly, if the defendant himself were lawful executor or administrator, he may prove a debt due to himself from the deceased, and if it be of a degree equal to that of the plaintiff's, retain to the amount; but an executor *de son tort* is not permitted so to retain. It has been said that to prevent a retainer, the plaintiff ought to show him to be executor *de son tort* by proof of the will, and that other persons are executors[2]: but it should rather seem that the *onus* in this case ought to lie on the defendant to show himself the legal representative of the deceased, than on the plaintiff to show the contrary; for the plaintiff knows nothing more of his title than finding him in possession of the effects. Besides, in most cases where a person is sued as executor *de son tort* no will whatever has been made, and in cases where the defendant pleads the retainer specially, it is always usual for him to state the letters of administration, or probate, and make profert of them.

[1] Crosse *v.* Smith, 7 East, 246.

[2] Vide Bul. N. P. 143.

[350]

On the Plea of Specialty Debts outstanding.

On the plea of judgments against the testator, or specialty debts outstanding, and *plene administravit præter*, the plaintiff may, in the case of the judgment, either traverse its existence, or reply that it was not duly docketted; in which case, as we have before seen, it has only the effect of a simple contract debt[1]. The bonds he likewise may deny; or he may in either case reply, that there are sufficient assets to satisfy them, and also to pay his debt; or that the bonds are conditioned for the payment of a less sum, which the creditor is willing to take, but that the defendant

[1] Steele *v.* Rook, 1 B. & P. 307.

Part II. *On the Plea of Specialty Debts outstanding.*

keeps them on foot by fraud to cover the assets, and that he had sufficient to satisfy the plaintiff's debt after payment of what was due.

If the judgment is denied by the replication, it of course forms an issue of *nul tiel record* for the court. If the bonds are so denied, the defendant must prove them by the subscribing witness, and if the defendant has pleaded several, and fail in the proof of any one, the whole plea is bad [1].

[1] Salk. 312.

On the second kind of replication, viz. the sufficiency of the assets, the evidence will be the same as on the general plea of *plene administravit*: But then, if the day of payment were passed, and the bond forfeited at the testator's death, the plaintiff must prove assets over and above sufficient to satisfy the full amount of the *penalty*, even though the conditions are set out in the plea [2]. In this case, therefore, it is always advisable for the plaintiff to reply *per fraudem*, and very little matter is sufficient to prove the first part of this replication. The circumstance of the creditor being willing to take a less sum, and the defendant having assets to pay it, is sufficient [3]; and then, whether there were more assets than were wanting to satisfy the debts really due, becomes the true question in the cause; as to which it is needless to repeat what has been before said as to the other replication.

[2] Bank of England v. Morris, 2 Stra. 1082.

[3] Parker v. Atfield, Salk. 311.

[351]

When the defendant pleads judgments recovered against himself, the plaintiff may make similar replications. If the existence of the judgment be denied, it will be by a replication of *nul tiel record*, and of course the trial will be by the court, and not by the jury. But if the plaintiff admit the fact of the judgment, and state that it was recovered by fraud, and that no debt whatever was due, it will then be incumbent on the defendant to prove to a jury the consideration of the judgment [4]. When actual fraud

[4] Trethewy v. Ackland, 2 Saund. 48.

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Action suggesting a Devastavit.

is charged by the replication, and not merely the circumstance of the penalty being stated as the debt, the plaintiff does not reply to that part of the plea which says that the defendant has no assets *ultra*[1].

There is another action against an executor or administrator, which requires a separate consideration; viz. that suggesting a *devastavit*. This action can only be maintained after a judgment recovered against the defendant *de bonis testatoris*; and as it charges him with wasting the goods, or applying them to his own use, it is brought in the *debet* and *detinet*, and the judgment is *de bonis propriis*.

[1] Vide 1 Stra. 410.

The plaintiff having before obtained a judgment for his debt *de bonis testatoris*, the defendant is not permitted in this action to say that he has duly administered such goods[2]; and therefore the only point in dispute on the plea of *nil debet* is the judgment and the *devastavit*.

[350]

[2] Erwing *v.* Peters, 3 T. Rep. 685.

The only evidence, therefore, which is necessary on the part of the plaintiff, is an examined copy of the judgment and of the writ of *fieri facias de bonis testatoris*, with the sheriff's return of a *devastavit* or *nulla bona* thereon[3]; for even should the defendant have goods of the testator, and not point them out to the sheriff when he goes to levy on the writ, the very concealment is sufficient evidence that he has embezzled or wasted them[4].

[3] Skelton *v.* Howling, 1 Wils. 258.

[4] Erwing *v.* Peters, 3 T. Rep. 685.

But though this evidence is sufficient on the part of the plaintiff, it is not conclusive against the defendant; for, notwithstanding the sheriff's return of a *devastavit*, he may still show that in point of fact he has not wasted the property of the testator, but that it still remains liable to the execution of the plaintiff; as if when the sheriff came to levy under the writ, he showed goods of the testator which remained in his hands undisposed of, but the sheriff refused to levy, or the like[5].

[5] Ibid.

CHAP. XIV.

OF THE EVIDENCE IN ACTIONS BY AND AGAINST HEIRS AND DEVISEES.

Ch. XIV. *By and against Heirs and Devisees.*

HEIRS or devisees may be plaintiffs upon the covenant made by their ancestor or devisor; or may be sued upon his bond, &c.; and they have frequently occasion to be parties in actions of trespass, replevin, and ejectment, when their right to the land itself comes in question.

In actions of covenant, debt, trespass, and replevin, the pleadings necessarily point out the fact to be proved; but, in the action of ejectment, every thing necessary to make out the title of the parties must be given in evidence.

SECTION I.

Of Proof of Title by an Heir.

Sect. 1. *Proof by Heir.*

THIS action, therefore, requiring the most evidence, we will suppose the case of a person bringing an ejectment as heir-at-law to his first cousin, *ex parte paterna*, who died seised of an estate; the father of the claimant having early in life offended his family, and being discarded from it, and therefore the lessor of the plaintiff put to the most strict proof of his pedigree.

The first fact necessary to be shown on such an occasion is, that the person from whom he claims was seised of the estate. Of which fact the actual possession

possession of it, or receipt of rent from the person in possession, is *prima facie* evidence [1](*a*); but if there also be evidence of possession in another, to rebut this presumption, the party should go further; for where it was proved that *A.* was in possession of land during his lifetime, and that after his death his daughter continued in possession forty years, while a son and heir lived near and knew the fact, such subsequent possession, contrary to the course of descent, was held to raise a stronger presumption that the father had only an estate for life, than his possession did of a fee, and this even in a writ of right[2]. The lessor of the plaintiff should next show that his father and uncle were descended from the same common ancestors, (his grandfather and grandmother), which fact may be proved by the register of their marriage, and that of the baptism of their children.

[1] Bul.N.P.103.

[2] Jayne v. Price, 5 Taunt. 326.

Where families have been long settled in the same place, and marriages have been celebrated with the consent of relations, this evidence will be easily obtained; but, in the case of clandestine marriages, or those of families which have lately risen from obscurity, it may be difficult to prove the actual celebration of a marriage at any distant period; therefore the general reputation of the family, that *A.* married *B.* or proof that they always passed as

(*a*) I have, in the text, put the case of a cousin *ex parte paterna*. If he claim as heir, *ex parte materna*, it will be necessary for him to prove, in addition to what is required in the other case, that the mother of the person from whom he claims was seised of the land, and that it descended to the person last seised from her; for, until the contrary is shown, the law always presumes that it descended from some remote unknown ancestor, and as it is more probable that it should come from the father than from the mother, does not suffer any of her blood to inherit till the other stock is entirely extinct, a case which can very seldom happen; this is the law applicable to every case where a man is in fact the first purchaser of lands, which he is presumed to hold as a feud of indefinite antiquity; but, in cases where the land did in fact descend from the father, the collateral heirs of the mother can never inherit.

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Part II. *Proof by Heir.*

man and wife, will be sufficient, though no register can be found, nor any person is living who was present at the marriage[1]. The birth of children may also be proved by the entry of their names in the family bible, &c. and where families have occasion to move from place to place, especially in great cities, it is very desirable that some such private register should be preserved, not only to be used as evidence itself, but also to refer to that which is more authentic. A father who will be at the trouble of registering the birth of each child in his bible, and also of mentioning the place at which such child was baptized, may prevent much litigation amongst his posterity. The time of the birth is in all cases necessary to be noted by the parent, for as to this the public register proves nothing, and it often becomes material to ascertain it[2].

[1] Vide ante, 14, &c.

[2] Per Lord Mansfield, Cowp. 93.

Proceeding in the chain of evidence, it is next necessary to show the marriages of the plaintiff's father and mother, his birth, the marriage of the father and mother of the person last seised, and that he is descended from them; as to the mode of proving which, nothing need be added to what has been already said, except that as we advance nearer to our own time, more correct and authentic evidence is expected than is to be looked for of more remote or early transactions.

[356]

The deaths of the persons last seised, and of the plaintiff's father are next to be proved, and if there ever existed any other person in the pedigree who stood before the lessor of the plaintiff, he should be prepared with evidence to show the death of such person, for, by the general rules of law, he who asserts the death of another who was once living, must prove the death, whether the affirmative issue be that he is dead or living[3]. To prove the fact of death we generally have the assistance of parish registers of burials;

[3] Throgmorton v. Walton, 2 Roll. Rep. 461. Wilson v. Hodges, 2 East, 312.

burials; but where families have been scattered abroad, and are not of any considerable station in life, these are not always to be found, and sometimes do not even exist. The reputation, therefore, of the family that their relation went abroad and died there, or inscriptions on tomb-stones, &c. which are a species of reputation, is sufficient[1]; and if he has not been heard of for seven years[2], and was never known to have been married[3], this is in every case *prima facie* evidence to presume his death without issue, until the contrary is proved (*b*). In cases of shorter absence than seven years, the presumption is that the party is still living, unless there is some evidence to rebut it. But this presumption may be rebutted by a contrary presumption without direct proof, as where a husband left his wife and went abroad, and the wife in little more than twelve months afterwards married again and had children, the presumption of law being that no one would commit a crime, it was held incumbent on the party who objected to the legitimacy of those children to prove the fact of the husband being alive at the time of the second marriage[4].

[1] Ante, 14.

[2] Roe v. Hasland, 1 Black. 404. Doe v. Jesson, 6 East, 80.

[3] Doe dem. Banning v. Griffith, 15 East, 293.

[4] Rex v. Twyning, 2 Barn. & Ald. 386.

I have hitherto considered only those cases where a child is proved to be born in wedlock in the lifetime of its parents; but the title of an heir-at-law may involve

[357]

(*b*) I have here mentioned the regular chain of evidence which is required to make out a title; but where a person has always been the acknowledged son, brother, nephew, or cousin of the person last seised, much less evidence will suffice; it was, indeed, in one case, contended, that general evidence of a person being reputed to be *heir* in the family of the deceased, though his degree of relationship was never mentioned, nor any evidence given to show a relationship, was *prima facie* evidence of title in him. The judges of the Common Pleas agreed that this was not sufficient to go to the jury; but they were divided on the question, whether, if any particular degree of *distant* relationship had been mentioned, it would have been necessary to have shown a pedigree, by proving the deceased and the claimant descended from some common ancestor, or at least, from two brothers or sisters, which is called an immediate descent. Vide *Roe* dem. *Thorne* v. *Lord*, 2 Black. 1099.

Part II. *Proof by Heir.*

involve more difficult considerations, viz. whether a child so born was in fact the issue of its supposed father.

Where a child is born of a woman legally married, during the lifetime of her husband, or within the usual time of gestation after his death, the presumption is, that such child is the issue of the husband; and, so strong was this presumption by the old rules of law, that if he were *within the kingdom* (*c*) no evidence was admitted to prove the child a bastard, except the total inability of the husband to beget children, as being under the age of puberty or having some other equally palpable defect [1].

[1] Co. Lit. 244, a.

[358]

It is now, however, holden, that this presumption may be rebutted by proof of *non access* [2] (*d*), as well as

[2] Pendrel v. Pendrel, 2 Stra. 925.

(*c*) The legal phrase, *infra quatuor maria*, seems to have been always taken with this limitation. Sir *Edward Coke*, in his commentary on *Littleton*, above cited, says, "if the husband be within the four seas, *that is, within the jurisdiction of the king of England*;" and in Jenk. Cent. 10, pl. 18, it is said, "that if the husband be in Ireland for a year, and the wife in England, during that time, has issue, it is a bastard; but it seems otherwise now for Scotland, both being under one King, and make but one continent of land."

(*d*) In the marginal abridgment of the case of *Goodright* dem. *Thompson* v. *Saul*, 3 Term Rep. 356, it is said, "The child of a married woman may be proved to be a bastard by other evidence than that of the husband's non access." But it must not be understood from this, that if the husband has access within such a period of time as would probably produce a child, it is competent to show that another person is the father. In that case it plainly appeared that another person lived with the wife; that she took his name; *that the husband left her*, and that the child bore the name of the person with whom she lived; but because it was not clearly ascertained where the husband was *all the time*, it was doubted whether non-access could be presumed. The judge, at the trial, thought this was not sufficient to rebut the general presumption of access; but he and the rest of the court were afterwards of a different opinion: and in the case of the *Banbury Peerage*, 2 Selwyn's Nisi Prius, 681, it was held, that though the husband and wife had the opportunity of access, the presumption of legitimacy arising from that fact might be rebutted by circumstances raising a contrary presumption. In a late case, where the husband was proved to have gone beyond seas two years before the birth of

as of total inability of procreation by the husband [1]; but still very strong evidence is required of these facts; if the husband ever had access to his wife, within such a distance of time before the birth of the child as to render it *possible* for the child to be his [2], the law will consider it to be so; and where his habit of body was only such as to make it *improbable* that he should beget a child, and not to render such an event wholly impossible, verdicts have generally been in favour of legitimacy.

[1] Lomax *v.* Holmden, 2 Stra. 940.

[2] Rex *v.* Luffe, 8 East, 193.

Where the parties are divorced, *a mensa et thoro*, the presumption is, that they did live apart, and the *onus* of proving access lies on the party who asserts the legitimacy of children born during such separation [3]; but, in the case of a voluntary separation by agreement, the law presumes access, unless the contrary be proved [4].

[3] Salk. 123.

[4] Ibid.

As to posthumous children, Lord *Coke* [5] has laid it down that *forty weeks* is the latest time which the law allows after the death of the husband, and that all born after that time are to be deemed bastards. But as gestation may be accelerated or retarded by various causes, Mr. *Hargrave* has, I think, satisfactorily proved, in two learned and laborious notes on that passage of Lord *Coke*, that though the presumption may be against the legitimacy of children born at a later period, yet that there is no positive rule of *law* which determines that they are not children of the deceased husband; that in every case it must be considered as a question of *fact* to be determined by evidence; and accordingly we find that where a woman had been delivered after the usual time, physicians were examined as to the cause, and on their evidence the issue was found to be legitimate [6].

[5] Vide Co. Lit. 123, b.

[6] Also *v.* Bowtrell, Cro. Jac. 541.

of a child borne by his wife, (who remained at home), and to have been abroad till within four months of the birth, the court held the conclusion that such child was a bastard to be irresistible. *Rex* v. *Inhabts. of Maidstone*, 12 East, 550.

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Part II.
Proof by Heir.

I have before[1] had occasion to mention how far the parents are admissible witnesses, or where their declarations may be given in evidence on questions of this nature. I shall only add, that the party who disputes the legitimacy may give general evidence that the mother was a woman of ill-fame, but he cannot, while she is living, prove her declarations, unless for the purpose of contradicting her after she has been examined as a witness[2].

[1] Ante, 177.

[359]

[2] Pendrel *v.* Pendrel, 9 Stra. 925.

SECTION II.

Of the Proof of Title by the Devisee.

Sect. 2.
Proof by Devisee.

If the action be brought by a devisee, he has only to prove the seisin of his testator, and the due execution of the will; but, as a particular form of execution is pointed out by the statute of frauds, and many decisions have taken place upon that statute which cannot be very well reconciled with each other, it may be necessary to state them at some length.

By that statute, viz. 29 Car. 2, c. 3, s. 5, it is enacted, that, "all devises and bequests of any lands or tenements, devisable either by force of the statute of wills, or by that statute, or by force of the custom of Kent, or the custom of any borough, or any other particular custom, shall be in writing, and signed by the party devising the same, or by some other person in his presence, or by his express direction; and shall be attested and subscribed in presence of the devisor, by three or four credible witnesses, or else shall be utterly void and of none effect."

[1] Roe dem. Gilman *v.* Heyhoe, 2 Black. 1114.
[2] Gilb. Eq. Rep. 169, &c.

What within the Statute.

1. In the first place it is to be observed, that devises of *copyhold*[1], or of mere chattel interests[2], (unless where a term is assigned to attend the inheritance,) are not within this statute; but any estate[3] for

[3] Whitchurch *v.* Whitchurch, 2 P. W. 236. 1 Stra. 621.

for years, or otherwise carved out of a freehold, are subject to the provisions of it.

Ch. XIV. s. 2. *Signing by the Testator.*

2. In cases within the statute, the first solemnity required by it is *signing*, and several cases have come before the court on the question as to what shall be deemed to be such.

[361]

It has been determined, that if the testator write his will himself, beginning "I, *A. B.*" this is sufficient, though he does not sign his name at the bottom [1]. But where it appears that he intended to sign his name at the bottom of each sheet of a will, consisting of more than one, and through weakness or incapacity was prevented from signing his name to some of the sheets, the signature to the others will not, it has been said, give effect to an instrument which it appears he did not consider as fully completed. This was, at least, the opinion of the judges of the Court of King's Bench in one case, but the cause being decided against the will on other grounds, no judgment was given on this point [2].

[1] Lemayne *v.* Stanley, 3 Lev. 1. 3 Mod. 219, S. C.

[2] Right dem. Cator *v.* Price, Dougl. 241.

The effect of *sealing* alone does not seem to be yet decided. It was in one case [3] said that this was *signing*, within the meaning of the act of parliament, and Lord *Raymond* is reported so to have ruled [4]. But, in a subsequent case [5], Lord *Hardwicke*, though he inclined to think this would be sufficient, said it was a point proper to be determined at law; and, in a still later case [6], the Court of Common Pleas declared an opinion to the contrary, but no formal judgment was given on the point.

[3] Lemayne *v.* Stanley, ubi supra.

[4] Warnford *v.* Warnford, 2 Stra. 764.

[5] Gryle *v.* Gryle, 2 Atk. 176.

[6] Vide Smith *v.* Evans, 1 Wils. 313. Vide also Ellis *v.* Smith, 1 Ves. jun. 11.

The will is directed to be attested by at least three witnesses; but considerable doubt seems to have been entertained how far it is necessary for the testator to publish the will to them at the time of the execution; Lord *Hardwicke*, in *Ross* v. *Ewer* [7], considered it to be necessary, and mentioned the case of the will of Mr. *Windham* of *Clearwell*, where his lordship

Publication of Will.

[362]

[7] 3 Atk. 156.

Part II. *Publication of Will.*

lordship said there was no doubt of the testator having executed the will in the presence of three witnesses, or, of their having attested it in his presence; which, he observed, showed that publication was, in the eye of the law, an essential part of the execution of a will, and not a mere matter of form. But in subsequent cases where the point has arisen, this seems to have been considered as proved by the very fact of attestation by the witnesses; for, in the first place, it has been holden that a delivery as a deed is a sufficient publication[1]; and even where the testator represented it to the witnesses to be a deed, and the attestation was "sealed and delivered[2]," the will was holden to be duly published; and in another case[3], tried before Mr. Justice *Denison*, at Lincoln, where the testator told the witnesses "*to take notice*," and then signed the paper and showed them where to write their names as witnesses, without saying what the instrument was; this was also holden by the judge to be a sufficient execution; and a similar decision was made by Lord Chief Justice *Trevor*, in the case of *Peate* v. *Ougly*, which I shall presently have occasion to cite more at large for another purpose.

[1] 8 Vin. Abr. 125, pl. 13.
[2] Trimmer v. Jackson, 4 Burn's Eccl. Law, 117.
[3] Wallis v. Wallis, Ibid. 114.

[363]

Attestation by Witnesses.

But the doubt in most of the cases which have arisen on this clause of the act of parliament, has been, what shall be a sufficient *attestation* by the witnesses.

First, it has been determined, that though the witnesses must all sign their names, or, in case they are illiterate, make their marks[4], as witnesses in the presence of the testator, yet that they need not do so in the presence of each other[5]; and, therefore, where the testator, having executed his will in the presence of two persons, who subscribed their names as witnesses in his presence, at a distant time afterwards called in a third person, and, showing him his name, *told him it was his hand-writing*, and desired him to witness

[4] Harrison v. Harrison, 8 Ves. jun. 185. Addy v. Grix, Id. 504.
[5] Smith v. Crodron, cited 2 Ves. 455. Grayson v. Atkinson, 2 Vez. 454. Jones v. Lake, cited 2 Atk. 177.

witness it, which he did also in the presence of the testator, it was holden that this was a good execution in the presence of three, and was properly attested by them.

Ch. XIV. s. 2. *Attestation by Witnesses.*

It follows from this decision that all the witnesses need not see the testator write his name; and accordingly it was determined by Sir *Joseph Jekyll*, that where three witnesses subscribed their names as witnesses in the presence of a testatrix, but *one* of them said that he *did not see her sign* her name, but that she *owned* at the time *that the signature was her hand-writing*, that this attestation was sufficient[1]. But where the testator signed in the presence of two witnesses, and afterwards, in the presence of the third, said, *this is my will*, but did not put his seal, *or acknowledge the hand-writing*, Lord *Hardwicke* inclined to think this was not a perfect execution, but gave no judgment, as the cause stood over on another part of the case[2].

[1] Stonehouse *v.* Evelyn, 3 P. Will. 253.

[364]

[2] Gryle *v.* Gryle, 2 Atk. 176.

In the case of *Peate* v. *Ougly*, before alluded to, the testator had written the will himself, and signed his name, and put a seal at bottom, and had added also, in his own writing, "signed, sealed, and published, as my last will and testament, in the presence of ——," two of the witnesses were dead, and the third swore that, about twenty-eight years before, being then servant to the testator, he and the other witnesses were called up in the night, and ordered to the testator's chamber, who produced a paper folded up, and desired him and the others to set their hands to it as witnesses, which they did in his presence; but the witness did not see any of the writing, nor did the testator say it was his will, or what it was; but he believed this to be the paper, because he never witnessed any other paper for the testator; and added that, though the testator did not set his

Peate *v.* Ougly, Comyns, 197.

Part II. *Attestation by Witnesses.*

name or seal to the will in their presence, yet he had often seen him write, and believed the whole will and codicil to be of his hand-writing; Lord Chief Justice *Trevor* thought the evidence sufficient for the jury to find the will well executed, and they found accordingly. 3 P. Will. 253. It must be noticed in this place, that it is said by the reporter of *Stonehouse* v. *Evelyn*, that, on his mentioning that case to Mr. Justice *Fortescue Aland*, he said, that it was sufficient if *one* of the three witnesses swore that the testator acknowledged the signing to be his own hand; "from whence," Powell's Law Dev. 80. Mr. *Powell* observes, "it seems a necessary inference, that such an acknowledgment at least is necessary to support the attestation;" but perhaps it may be questionable whether this observation is applicable to all cases. Where a will is written by a third person, and signed by the testator at the bottom, it may be said that without such acknowledgment there is no other evidence of the will having been signed by him, than that arising from similitude of hands, and therefore it does not appear but that the signature might be made afterwards by the testator when alone, but where a will is written wholly by the testator, as was the case in *Peate* v. *Ougley*, and the testator's name is in the body of the will, or as in that case in such a place as evidently shows that it must have been written at the time of attestation, it should seem that no such acknowledgment is essential to its validity, because the bare inspection proves that the whole must have been written before it was attested by any of the witnesses.

Vide Lemayne v. Stanley, ante, 383.

Though the witnesses need not, according to the foregoing cases, all attest at the *same time*, or in the presence of each other, yet it has been holden, that unless they all attest *the same instrument*, and that whereby the lands are intended to pass, the requisites

[366]

of

of the act are not complied with, although the testator by a subsequent paper evidently meant to confirm the first.

And therefore, where a testator devised his lands by a will made in the presence of and attested by two witnesses only, and about a year afterwards made a codicil whereby he revoked a legacy given by his will, and declared that the will should be ratified and confirmed in all things, except as altered by that writing, and that this codicil should be taken as part of his will; and executed his codicil in the presence of one of the former witnesses and another person, neither the other witnesses nor the first will being present, it was holden that this attestation was not sufficient [1]; and in another case [2], where a man having made his will, written with his own hand, and signed and sealed, but not witnessed, afterwards made a codicil attested by four witnesses, which was called a codicil to be annexed to his last will, but the will was not produced at the time of executing the codicil; it was also holden that this will was void for want of a due attestation.

[1] Lea *v.* Libb, Carth. 35.
[2] Attorney General *v.* Barnes, Prec. Ch. 270.

In the last case the court seems to have laid some stress on the circumstance of the first will not being produced at the time the codicil was executed: but in one which afterwards came before the court [3], the mere production of the will was holden not to be sufficient to give it validity. The testator having, by a will not witnessed, devised lands, afterwards made a codicil, and taking the codicil in one hand and the will in the other, said, "This is my will whereby I have settled my estate, and I publish this codicil as part thereof," and then signed the codicil (which lay upon the table with the will) in the presence of seven witnesses, who subscribed it in his presence. The testator then put the will and codicil together into a sheet of paper, and sealed them up in the presence of

[3] Penphrase *v.* Lord Lansdown, cited Comyns, 384.

[367]

Part II. *Attestation by Witnesses.*

the same witnesses, but the will was not unfolded in their presence, nor did any of them write their names upon it or on the paper wherein it was inclosed, and notwithstanding the fact of the will being so produced, and the codicil itself reciting the will and the words "I by this codicil, which I appoint to be taken as part of my will," being used in it, *Parker*, Ch. Justice, and the court, on a trial at bar, held the will to be void.

In the above cases the court evidently considered the codicil as a separate instrument from the will, and, upon that ground, determined that there was no due attestation of the former; but, if several writings be made by a testator on the same paper, and it plainly appear that his intention was that all should form but one will, and not a will and codicil; in such case the execution of the last will be considered as the execution of the whole; and, therefore, where the testator wrote, upon a sheet of paper, a will, dated 2d May 1752, whereby he disposed of lands, and signed it, but which was not sealed or attested; and afterwards wrote, on the same sheet of paper, a memorandum, dated 5th Jan. 1754, wherein after disposing of some personalty, he added, "this is not to disannul any of the *former part* made by me the 2d of May 1752, except that my wife shall not be liable to pay my son *John*, &c." and subscribed the latter memorandum, and published the whole in the presence of three witnesses; the court held this a good attestation of the whole, which they considered as *one* will, the second being a mere continuation of the first. In this case Lord *Mansfield* observed, the memorandum was not called a *codicil*. But even supposing the second were called a *codicil*, yet if written on the *same piece of paper*, "it seems," as is observed by Mr. *Powell*, "that whether the subscription belongs to both instruments is a fact to be

Carleton dem. Griffin *v.* Griffin, 1 Burr. 549.

[368]

be determined by a jury on all circumstances." There certainly would be no danger in leaving it to the jury in such case, as there might be when the will and codicil were written on *separate papers*, for one paper could not be substituted for another, as might be the case if the attestation of a codicil on a separate paper were to be under any circumstances considered as an attestation of a former will.

A will, indeed, made at one time, on several sheets of paper, has been holden to be valid, though all the sheets are not signed by the witnesses; but every part of it must be present at the time of the execution, for if the last piece of paper only be attested by three witnesses, and none of them ever saw the first, it is not a good will[1]. But unless this fact be expressly proved, the presumption, in cases where the sheets correspond, will be, that the whole will was in the room at the time. And, therefore, where a testator made his will, consisting of two sheets of paper, all of his own hand-writing, and signed his name at the bottom of each page, and made a codicil also of his own hand-writing on a single sheet, and then showed *the whole of the will and codicil* to one witness, who attested both in his presence; and two other persons coming in immediately afterwards, the testator showed the codicil and *last sheet of his will* to them, and sealed and published both papers in their presence, and they attested both instruments; and the whole will and codicil, after the death of the testator, were found wrapped up in the same paper in his bureau, but the two sheets of the will not pinned together; this was holden to be a good attestation, though the two last witnesses never saw the first sheet of the paper, nor was it produced to them[2] (*e*). The

[369]

[1] 3 Mod. 263. 1 Eq. Cas. Abr. 403. 7.

[2] Bond v. Seawell, 3 Burr. 1773.

(*e*) The distinction as to the finding of evidence and facts, which I have so often had occasion to allude to, occurred in this case. This evidence being stated on a special case, which it was agreed

Part II.

Subscription in the Presence of the Testator.

The witnesses must write their attestations in the presence of the testator; but what shall be deemed to be his presence has often been made a question in a court of justice.

[370]

If the testator were in such a situation that he might have seen the witnesses attest the instrument, though there is no positive proof that he did see them do so, as if, after seeing the testator sign the will, they withdraw to another room, and there sign their attestation on a table opposite to the door of the room where the testator lies [1], or the testator calls at his attorney's and executes his will sitting in his carriage, and the witnesses, after seeing the execution, return to the office to write their attestation, the carriage being in such a situation that the testator might see what passed in the office [2]; or the curtains are drawn round the testator's bed, and the witnesses attest in the same room [3], these are all valid attestations, because the testator *had the power* of seeing the attestation, if he chose to exercise it. But if the testator were in such a position that he could not see the witnesses subscribe, as when the witnesses subscribed in another room, out of his sight [4], though he expressly desired them to retire, on account of the heat and noise of the room disturbing him [5], such execution will not be good; the design of the statute being to prevent a wrong paper from being obtruded on the testator, in the place of

[1] Sheers *v.* Glasscock, Salk. 688. Davy *v.* Smith, Salk. 393.

[2] Casson *v.* Dade, 1 Brown. Ch. R. 99.

[371]

[3] Davy *v.* Smith, ub. sup.

[4] Eccleston *v.* Petty, alias Speke, Carth. 79. Broderick *v.* Broderick, 1 P. Will. 239.

[5] Machel *v.* Temple, 2 Show. 288.

agreed might be turned into a special verdict, Lord *Mansfield* said, that the due execution of the will could not be come at in the method wherein the matter was then put, for, considered as a *special verdict*, it was defectively found as to the point of the legal execution of the will; that every presumption ought to be made *by a jury* in favour of such a will, when there was no doubt of the testator's intention, and that they all thought the circumstance sufficient to *presume* that the first sheet was in the room, and that the jury ought to have been so directed; but upon a special verdict nothing could be presumed, therefore it must be tried over again; and, if the jury should be of opinion that it was then in the room, they ought to find for the will generally.

the

the true one; and for this reason it is, that even if the testator has signed his will, and be personally present, yet, if his mental faculties are gone before the witnesses actually sign their attestation, the requisites of the statute are not complied with [1].

The last thing to be considered in the attestation of a will, is, who may be witnesses to it. The act requires that they shall be *credible*, but what persons the law considers to be such, has been matter of much controversy. I had occasion, in the former part of this work, when speaking of interested witnesses, to remark the difference of opinion which prevailed between Lord Chief Justice *Lee* and Lord *Mansfield* on this point, and to mention the act of parliament which had been made in consequence of the decision of the case of *Anstey* v. *Dowsing*. That statute has provided for some cases; but, in such as are not within its express provisions, it seems still doubtful whether witnesses, interested at the time of the attestation, can be made good by a subsequent release [2]; and it is clearly settled, that if either of the witnesses be infamous at the time of subscription, the will is not properly executed [3].

[1] Right dem. Cator *v.* Price, Dougl. 241.

Ante, 154.

[372]

[2] See Hudson *v.* Kersey, 4 Burn. Eccl. Law, 97; and Powell's Law of Devises, 129, &c.

[3] Pendock dem. Mackinder *v.* Mackinder, 2 Wils. 18.

To conclude, it appears from the foregoing cases, that, to prove a will properly executed, within the statute of frauds, it must appear to have been executed by the testator, or some person for him; and to have been attested by three credible witnesses, either at the same or different times; that the witnesses subscribed their names in the presence of the testator, and that they all saw the same instrument executed.

Formal Proof of Will.

To prove these facts the original will should be produced, and one, at least, of the subscribing witnesses, if living, be called. If he can prove the due execution by the testator, in the presence of himself and the other witnesses, and their subscription in the

Longford *v.* Eyre, 1 P. Will. 741.

Part II. *Formal Proof of Will.*

presence of the testator, there will not, unless in cases where the will is disputed, be any occasion to call the others. But when the will is disputed, the devisee should call all the subscribing witnesses, and if they deny the due execution, or the sanity of the testator, he will then be at liberty to call other witnesses [1].

[1] Vide Bul. N. P. 264; Lowe *v.* Jolliffe, 1 Black. 365. Goodtitle dem. Alexander *v.* Clayton, 4 Burr. 2224.

When it becomes necessary to prove the will after the death of all the subscribing witnesses, their handwritings should be proved; and, in such case, unless there be some strong circumstances to show the contrary, the presumption is, that it was duly executed; and even where the form of attestation has not been strictly pursued, the presumption will, nevertheless, prevail. Thus, in two cases [2], where, after the death of all the witnesses, the attestation appeared to be "signed, sealed, published, and declared, by the testatrix, as her last will and testament, in the presence of us ———," and it was objected, that it did not appear that the witnesses subscribed in the presence of the testatrix; this fact was left to the jury, and they found, under the direction of the court, that the witnesses did so subscribe, and that the will was properly executed.

[373]

[2] Hands *v.* James, Comyns, 531. Croft *v.* Paulet, 2 Stra. 1109.

SECTION III.

Of Evidence by the Heir to defeat the Will.

Sect. 3. *Evidence to defeat the Will.*

To defeat the will the heir-at-law may prove that it is a forgery; that the testator was insane, or under influence or coercion; or, that if it were once a legal or valid instrument, its operation has been destroyed by a subsequent act of the testator.

[374]

As to the objection on account of forgery, the fact will, in a great measure, depend on the veracity of the

the subscribing witnesses, and on the hand-writing of the testator. Any circumstances, therefore, which go to impeach the credit of the witnesses, or to show that the signature, purporting to be the name of the testator, is not of his hand-writing, will be proper to be adduced in evidence. We have before had occasion to consider how far comparison of this signature, with other writings of the testator, is admissible.

Ante, 101.

Insanity may be of three kinds, idiotcy, fatuity, and madness or lunacy.

A perfect idiot, or natural born fool, viz. one who could never tell his parents, or his age, or who is not able to count a small sum of money, or transact the like common matters, is totally incapable of making a will; and so notorious must this defect be, that it is hardly possible to suppose the case of an attempt to set up a will as made by a person of this description. Persons, indeed, of but little better understanding, may be, and often are, imposed on, or intimidated by those around them; but such cases may more properly be considered as falling under the head of *undue influence* or *coercion* than under that of incapacity in the testator.

Fitzh. N. B. 233.

The second species of insanity, nearly allied in its nature to that of idiotcy, generally falls on persons far advanced in life, when the loss of memory and understanding often renders those who, perhaps, in the earlier periods of their existence were the brightest ornaments of society, melancholy instances of the infirmity of human nature. Persons of this description are incapable of making a will, "for it is not sufficient (as Lord *Coke* observes) that the testator be of memory to answer familiar and usual questions, but he ought to have a *disposing memory*, so that he is able to make a disposition of lands with understanding and reason, and that is such a memory

[375]

Marquis of Winchester's Case, 6 Co. 23.

Part II. *Insanity.*

a memory which the law calls sane and perfect memory."

Cases of this sort generally depend on a mixed kind of evidence, for it seldom happens that such persons make wills from the suggestions of their own minds; they are generally imposed on by those amongst whom they have the misfortune to be placed; and, therefore, the conduct of those around them, as well as the imbecility of their own minds, is generally the subject of inquiry in a court of justice.

But the cases which require the greatest attention, which frequently baffle the understanding of the most acute, and for the proof or decision of which no certain rules can be laid down, are those of wills made by persons, who, though in sound health, and full vigour of body, have the misfortune to labour under that mental derangement which prevents them from forming just and accurate notions concerning the conduct of human affairs. Unlike the *idiot*, who seems deprived of all reasoning faculties, the *madman* appears to reason, and, unless when the predominant idea which always possesses these unhappy persons intervenes, he frequently appears to reason right; insomuch that many instances must have occurred to the experience of all who have been in
[376] the habit of attending courts of justice, where persons who have been proved to demonstration to be utterly deprived of reason, have passed, to common and casual observers, as people of extraordinary talents and abilities.

The proof in these cases may sometimes be of the same mixed nature as in the preceding, but more frequently it is confined to the state of the testator only; for persons of this description are more accustomed to act from their own whim and caprice than from

from the suggestions of others. The following observations of Lord *Thurlow*, in the *Attorney General v. Parnther*, will be found applicable to most cases of this description: "There can be (says his lordship) no difficulty in saying, that if a mind be possessed of itself, and that at the period of time such mind acted, that it ought to act efficiently. But this rule goes very little way towards that point which is necessary to the present subject; for though it be true, that a mind in such possession of itself ought when acting to act efficiently, yet it is extremely difficult to lay down, with tolerable precision, the rules by which such state of mind can be tried.

3 Bro. Ch. Cas. 440.

"The course of procedure for the purpose of trying the state of any party's mind, allows of rules. If derangement be alleged, it is clearly incumbent on the party alleging it to prove such derangement. If [377] such derangement be proved, or be admitted to have existed at any particular period, but a lucid interval be alleged to have prevailed at the period particularly referred to, then the burthen of proof attaches on the party alleging such lucid interval; who must show sanity and competence at the period when the act was done, and to which the lucid interval refers; and it certainly is of equal importance that the evidence in support of the allegation of a lucid interval, after derangement at any period has been established, should be as strong and as demonstrative of such fact, as where the object of the proof is to establish derangement. The evidence in such case, applying to stated intervals, ought to go to the *state and habit* of the person, and not to the accidental interview of any individual; or to the degree of self-possession in any particular act; for from an act with reference to certain circumstances, and which does not of itself mark the restriction of that mind, which is deemed necessary in general to the disposition

Part II. *Insanity.*

disposition and management of affairs, it were certainly extremely dangerous to draw a conclusion so general, as that the party, who had confessedly before laboured under a mental derangement, was capable of doing acts binding on himself and others."

This doctrine of Lord *Thurlow*, however, does not seem to have met with the full assent of others who have had occasion to consider the subject[1]. In the case of *White* v. *Driver*[2], in the Ecclesiastical Court, Sir *John Nichol* observed, that though it was scarcely possible to be too strongly impressed with the great degree of caution necessary to be observed in examining the proof of a lucid interval, yet the law recognised acts done during such an interval as valid, and that "the law must not be defeated by any overstrained demands of the proof of the fact." In a former case[3], which had come before Sir *W. Wynne*, who was a very able judge, in the Prerogative Court, he observed, that "the strongest and best proof that could arise as to a lucid interval, was that which arose from the act itself; *that* he considered as the thing first to be examined; and if it could be proved and established, that it was a rational act rationally done, the whole case was proved." Sir *William* then cited a passage from *Swinburne*, wherein it is said, that "if a lunatic person, or one that is beside himself at times, but not continually, makes his testament, and it is not known whether the same were made while he was of sound mind and memory or not, then, in case the testament be so conceived as thereby no argument of frenzy or folly can be gathered, it is to be presumed that the same was made during the time of his calm and clear intermissions; yea, (he adds), although it cannot be proved, that the testator used to have any clear and quiet intermission at all, yet, nevertheless, I suppose that if the testament be wisely

[1] Vide Ex parte Holyland, 11 Ves. 11.

[2] White v. Driver, 1 Phil. 88.

[3] Cartwright v. Cartwright, cited 1 Phil. 90.

wisely and orderly framed, the same ought to be accepted for a lawful testament." Having made this quotation, Sir *William* then, in some measure, limits the generality of his former position, by saying, "Undoubtedly, there must be a complete and absolute proof that the party who had so framed it did it without any assistance;" but adds, "If the fact be so, that he has done without assistance as rational an act as can be, what then is more to be proved I do not know, unless it can be shown by any authority or law what the length of the lucid interval is to be, whether an hour, a day, or a month. I know of no such law as that; all that is wanting is, that it should be of sufficient length to do the rational act intended. I look upon it, if you are able to establish the fact that the act done is perfectly proper, and that the party who is alleged to have done it was free from the disorder at the time, that is completely sufficient."

Perhaps, at last, the difference between these learned persons may have been more in words than substance. The *state and habit* of sober thinking, required by Lord *Thurlow*, may be evinced in some degree by the propriety and discretion of the act on which the testator's mind was employed; and if, as in the case first put by *Swinburne*, the testator was only beside himself at times, and it was not known otherwise than by the instrument itself whether he made it while of sound mind or not, the instrument would be one criterion by which the state of the mind at the time might be discovered: but for the other case put by *Swinburne*, of a person who was never known to have had any lucid intervals, being deemed to be competent to dispose of property, from the mere circumstance of his having accidentally made a prudent disposition, I believe there

Part II. *Revocation of a Will.*

there is no other authority than the supposition of that learned author.

We are next to consider the evidence necessary to show that a will, once operating, has since lost its force. This may be done in three ways:

[378]

1st, By proving an actual revocation.

2dly, By showing such a change or alteration in the circumstances of the testator as imply such intention on his behalf, though he has never directly expressed it.

3dly, By showing a change or alteration of estate in the property devised.

29 Car. 2, c. 3, s. 6.

The mode of proof in the first of these cases has been pointed out by positive law; for, by the statute of frauds, it is enacted, "That no devise, in writing, of lands, tenements, or hereditaments, nor any clause thereof, shall be revocable, otherwise than by some other will or codicil in writing, or other writing declaring the same; or by burning, cancelling, tearing, or obliterating the same, by the testator himself, or in his presence and by his direction and consent. But all devises and bequests of lands and tenements shall remain and continue in force until the same be burnt, cancelled, torn, or obliterated, by the testator, or by his directions in manner aforesaid; or unless the same be altered by some other will or codicil in writing, or other writing of the devisor, signed in the presence of three or four witnesses, declaring the same; any former law or usage to the contrary notwithstanding."

Per Lord Hardw. 2 Atk. 72.

This clause, like that before alluded to, extends not only to devises of lands, but also to sums of money charged upon them, both must be revoked in the same manner.

[379]

By this clause of the act of parliament, three modes of cancellation are pointed out, viz. 1. The making

making a new will. 2. An express written declaration of the testator's intention to revoke, signed by him, in the presence of three or more witnesses; or, lastly, The destruction of the instrument by burning, tearing, or obliterating.

Ch. XIV. s. 3. *Actual Revocation.*

In order to show a revocation by the first of these means, it must be proved, that the testator made another perfect and complete will, which of course must be produced, and proved in the same manner as the original will; for if, by any informality in the execution of such second will, it does not operate as a devise of the land, it will not have the effect of revoking the former will; and, therefore, where the second will was executed by the testator, in the presence of three witnesses, but they did not sign their names in his presence[1], it was holden, that this did not operate to cancel the first will; for there did not appear to be any intention of the testator to revoke his will, without at the same time making another disposition of his property; and, as the whole of his intention could not take effect, the act done by him was considered as a nullity, and the old will remained.

[1] Eggleston *v.* Speke, 1 Show. 89. Carth. 80, S. C. Onyons *v.* Tyrer, 1 P. W. 343.

The second mode of cancellation, viz. the declaration of his intention to do so, by *writing*, signed in the presence of three or more witnesses, which writing is not in itself intended to operate as a will, does not, according to the opinion of Lord *Cowper*, require this formality of the subscribing witnesses signing in the presence of the testator; for this depends on the 6th section of the statute only, which barely requires that the writing shall be so signed by the testator; whereas, when that section speaks of a *will*, such a will is intended as is required by the preceding section of the act. And on the other hand, the words "signed in the presence of three or four witnesses," referring to the words *other writing*,

Vide 1 P. Will. 344. Cox's ed. note (1).

[380]

Ante, 398.

Part II. *Actual Revocation.*

writing, and not to the word *will*, which, as we have seen before, may be good without being *signed* in the witnesses presence; a will properly executed, taking effect as such, operates as a revocation though not signed by the testator in the presence of the witnesses [1].

[1] Vide Hoil *v.* Clerk, 3 Mod. 218, & Ellis *v.* Smith, 4 Burn's Eccl. Law, 199. 4 Ves. jun. 11. S.C.

Lastly, a will may be shown to be destroyed by its having been burned, cancelled, torn, or obliterated, though no other instrument has been made by the testator. But it must appear in proof that such burning, &c. was done *animo revocandi*, for the act is only considered as a symbol of the intention; and, therefore, if a man were to throw ink, instead of sand, on his will, it would not be an obliteration within this clause of the act [2]. So, if having two wills of different dates by him, he should direct the former to be cancelled, and through mistake the person to whom such directions were given should cancel the latter, this would be no revocation of such latter will. On the same principle of intention, where the testator having prepared a second will, but which he had not executed in form, began to tear the first will, but desisted on being told that the second was not a perfect instrument, and never afterwards perfected such second will, it was holden that the first was not revoked [3]. And where the testator, being angry with one of the devisees, began to tear his will with the intention of destroying it, and having torn it into four pieces, was prevented from proceeding further, partly by the efforts of a by-stander, who held his arms, and partly by the entreaties of the devisee, and then becoming calm put by the several pieces, and expressed his satisfaction that no material part of the will had been injured, it was left to the jury to say, whether he had completely finished all that he intended to do for the purpose of destroying the will; and the jury having

[2] Per Lord Mansfield, Cowp. 52. Per Lord Cowper 1 P. Will. 346.

[3] Hyde *v.* Hyde, 1 Eq. Cas. Abr. 409. Short dem. Gastrell *v.* Smith, 4 East, 419.

having found that he had not, the court refused to disturb the verdict[1].

In like manner, where intending to add new trustees and bequests, the testator obliterated the name of one trustee, and introduced another, without altering the general purposes of the trust, but did not republish his will, so as to give efficacy to it as a new devise, the court were inclined to be of opinion that the whole will remained unaltered; but they determined, that at most it was a revocation *pro tanto* only, and did not totally destroy the will[2].

[1] Doe dem. Perkes *v.* Perkes, 3 B. & A. 489.

[381]

[2] Vide Larkin *v.* Larkin, 3 Bos. & Pul. 16. 109.

On the other hand, if it plainly appear that the testator intended to cancel the will, and did any act towards such cancellation, though its destruction was not completed, it will amount to a revocation; and, therefore, where a testator, (having often declared himself dissatisfied with his will,) being in bed near the fire, ordered a person who was in the room to fetch it, and, after looking at it, gave it a rent, and threw it on the fire, from whence it fell, but would have been burned had not the person, who was so desired to fetch it, taken it off the fire unobserved by the testator, it was holden to be a revocation[3](*f*); and if, having made two parts of a will, the testator, *animo revocandi*, destroy one, it is sufficient to annul both[4].

[3] Hibb dem. Mole *v.* Thomas, 2 Blac. 1043.

[4] Sir Edw. Seymour's case, cited Com. 453. Vide Burtonshaw *v.* Gilbert, Cowp. 49. Titner *v.* Titner, 3 Wils. 508.

These cases, therefore, depending entirely upon the intention of the testator, are altogether the subject of parol evidence, and resolve themselves into a question of fact to be determined by the jury.

The doctrine of implied revocations, by reason of an alteration in the circumstances of the testator,

[382]

(*f*) There were several other circumstances in this case of subsequent declarations and devises of the testator; but these were considered merely as confirmatory of the intention expressed at the time he did the act.

Part II. *Implied Revocation.*

was borrowed from the civil law, and has been but recently introduced into Westminster Hall, in cases of devises of landed property. It is now, however, clearly settled, that the marriage of the testator, and the birth of a child subsequent to the time of making his will, wherein no provision is made for the objects of these relations, whether such child be born in the lifetime of the testator, or after his death, and whether, in the latter case, he knew of his wife's being *enseint* or not, amounts to a revocation[1]; for, it is presumed, that when a man makes his will, he annexes a tacit condition to it, that it shall not take effect if there should afterwards be such a total change in the situation of his family. But marriage alone does not produce this effect, for a woman must be supposed to take care that a suitable provision is made for her at the time of marriage[2]; neither will the mere circumstance of another child being born operate to annul a will, made by a married man, whereby he provides for the children then *in esse*[3]. And, if a man who lives with a woman, to whom he is not married, makes a will, whereby he provides for her, and such children as he may have by her, and afterwards marries her, and has legitimate children by her, this is not deemed such a total alteration of his circumstances, as to revoke the will so made before his marriage[4].

[1] Christopher v. Christopher, cited 5 T. Rep. 55. Doe dem. Lancashire v. Lancashire, 5 T. Rep. 49.

[2] Jackson v. Hurldook, cited 5 T. Rep. 53.

[3] Shepherd v. Shepherd, cited 5 T. Rep. 51. and Ward v. Phillips, therein cited.

[4] Kenebel v. Scrafton, 2 East, 530.

[383]

The ground on which some of the earlier cases, which determined this alteration of circumstances to be a revocation, proceeded, was an implied intention in the testator *subsequent* to making the will to revoke it; and as this was a presumption of law, it was permitted to rebut it by evidence of declarations made by the testator, which showed a contrary intention; but since it has been put on the other ground of a condition annexed to the will at the time of making, on which ground alone the revocation in favour of a posthumous

Vide ante, 120, &c. Lugg v. Lugg, Ld. Raym. 441.

posthumous child, when the testator did not know of his wife's pregnancy, can be supported; it may be much doubted, whether such evidence can be received, in the case of a will of lands. In the last case which came before the court, the judges cautiously abstained from giving any opinion on this point.

Ch. XIV. s. 3. *Implied Revocation.*

Vide 2 East, 543.

A will may also be shown to be revoked, by any change of the testator's estate in the lands devised, as if he take a new estate in them after making the will. This does not at all depend on any intention of the testator; on the contrary, where he does an act for the very purpose of making his estate more perfect, and his will more firm, yet, if by that act he acquires a new estate, his will is revoked, or rather never operates on the estate since acquired, any more than it would on any lands subsequently purchased. In these cases the heir-at-law must prove the alteration of the estate by regular evidence of the different documents, whereby it was effected.

See the cases on this point, collected 1 Will. Saund. 277, note (4).

[384]

Republication.

Having thus shown how a will may be proved by the heir-at-law to have been defeated, it will be proper, before we close the chapter, to say a few words on the nature and effect of republication; the proof of which will, in some cases, extend the operation of a will to lands not otherwise affected by it; and, in others, restore its powers after a revocation, provided it was not actually obliterated or destroyed.

A will of lands operates only on such as the testator had at the time of making it, for lands subsequently acquired do not pass by it. But as the will is ambulatory till the time of the testator's death, a republication subsequent to the time of the testator's having acquired such additional property or estate, will cause the will to operate thereon; provided the words of the will are sufficient to cover such newly

Part II. *Republication of the Will.*

acquired property. In other words, the effect of republication is the same as making a new will, and the old will operates the same as if it had been originally made at the time of its republication.

Before the statute of frauds any declaration by the testator, that the instrument before executed continued to be his will, was considered as amounting to a republication, and such is still the law with respect to copyhold or leasehold interests; but as freehold estates are by that statute devisable only in a particular form, and the effect of republication is the same as making a new will, it follows that a republication of a will actually revoked, or which is to make it affect newly acquired property, must have all the formalities which were required to make an original will. The republication may be effected either by a new execution of the old will, or by making a codicil, also attested in the presence of three witnesses, referring to the will as an existing instrument[1]. And a codicil so made will pass lands which a testator had contracted for before, but taken a conveyance of after the making of his will[2]. But it should be observed, that where the codicil is properly such, and not a continuation of the original instrument, it will only *restore* the will or *extend* it, and will not, however well made itself, operate so as to make that which was invalid in its execution a perfect instrument; wherefore, if a will be made without witnesses, and a codicil added which is properly attested, this will not give an operation to the original will which it never had before[3].

2 Atk. 599.

[385]

[1] Martin v. Savage, cited 1 Ves. 440.

[2] Goodtitle d. Woodhouse v. Meredith, 2 M. & S. 5.

[3] Attorney General v. Barnes, Prec. Ch. 270. Vide ante, 388. Martin v. Savage, ubi supra. See also Goodtitle v. Otway, ante, 120.

From this rule, which requires the will to be republished and attested in the same manner as was necessary to constitute an original will, it follows, that all parol evidence of an expressed intention that the will should stand, is inadmissible in this case.

There

There is a distinction, however, to be made between a will which is actually and formally revoked, and one which is only revoked by the circumstance of another will being subsequently made. In the latter case, we have before seen that the new will does not revoke the old one, unless it be itself a perfect instrument; and, on the same principle that it was so determined, it has been also holden, that if a man, having made two wills, keep them both by him uncancelled, and afterwards cancel the last, this of itself operates as a republication, or rather as a restoration of the old will, so partially and conditionally revoked, without any formal act of republication [1]; but had the first will been actually cancelled, when the second was made, the subsequent destruction of the second will would not, of itself, have restored the operation of the first [2].

[386]

[1] Goodright dem. Glazin *v.* Glazin, 4 Burr. 2512.

[2] Burtonshaw *v.* Gilbert, Cowp. 49.

SECTION IV.

Of the Evidence in an Action against an Heir or Devisee, on the Specialty of his Ancestor or Testator.

THOUGH a man's executors are bound for all debts due from him, yet an heir is only bound by judgments against him, or debts secured by recognizance or bond under seal, in which the heir is particularly named.

I do not deem it necessary to say any thing here respecting the proceedings on a judgment obtained against the ancestor, or recognizance entered into by him, further than that the proceeding being rather against the land than the person of the heir, the principal point to be established on a *scire facias* against the heir or terre-tenants, will be the seisin of the

Part II. *Action against Heir, on Specialty.*

the ancestor at the time of or subsequent to the judgment or recognizance; and that seisin being once established, the land is bound and a *moiety* extendible, whatever subsequent disposition may have been made of it.

The case of an *action* against the heir, on the bond of his ancestor, materially differs from the above proceeding. The defendant may plead generally, *riens per discent*, and then it will be incumbent on the plaintiff to prove not only the seisin of the obligor, but a descent to the defendant; and in the event of his falsifying the plea, the plaintiff has (unless in the case of an estate *pur autre vie*, the provisions of the statute of frauds, respecting which will be noticed hereafter,) a judgment against the defendant personally for his whole debt, who is answerable for his false plea, however small the value of the lands which have descended to him may be[1]. The plaintiff, however, is not confined to this remedy, but by suggesting that particular lands have descended to the heir, may have the *whole* of those lands delivered to him in execution, whereas if he sued out an *elegit* against them as the land of the heir, he would have only a *moiety*[2].

[1] Plowd. 440. Smith v. Angel, 7 Mod. 44.

[2] Vide Herbert's case, 3 Co. 12. Bowyer *v.* Rivitt, Sir W. Jones, 87.

The descent must be proved as laid in the declaration; for though the plaintiff is not bound to state in what manner the defendant is heir[3], he must, when he states an immediate descent to the defendant, show, that the estate so descended; proof in such case, either by the plaintiff or the defendant, that the land descended first to *A.* and then to the defendant, would not support a declaration so framed[4]: but if the intermediate heir has never had actual seisin of the *fee*, as where *A.* being seised in fee, bound himself and his heirs in a bond, and having two sons, *B.* and *C.* limited the estate to himself for life, remainder to *B.* his eldest son in tail,

[3] Denham *v.* Stephenson, 1 Salk. 365, 6 Mod. 241.

[4] Jenk's case, Cro. Car. 151.

tail, reversion to his own right heirs, and died, upon which *B.* entered and died, leaving a son *D.* who died without issue, whereupon the estate-tail became extinct, and the reversion coming into possession descended upon *C.* the youngest son of the obligor, though *C.* was heir of *B.* as well as of *A.* it was held that he might be charged as the immediate heir of *A.*, for *B.* and *D.* being both seised of only an estate-tail, *C.* took the estate in fee immediately from his father[1].

[1] Killow *v.* Roden, Carth. 126.

To prove seisin and descent, the fact of the obligor being in possession, or receipt of rent, and that the defendant succeeded him, will be *prima facie* evidence, and will cast the burthen on the defendant of accounting for it by some other title.

This he may do by showing that the obligor had mortgaged the land *in fee*[2], that the estate was copyhold[3], that the obligor had only an estate-tail[4], or a reversion expectant on such an estate in another[5], which, though it would be assets should the estate-tail become extinct, is not so during its continuance, the tenant in tail having the power of barring it[6]. But where the obligor is seised of a reversion in fee, expectant on a mere *life estate*[7] (*g*); or where there is a mortgage for only a *term of years*[8], such estates are considered assets, and the plaintiff will, on this plea, recover in his action, though he may not be able to obtain execution, at law, against the land of the obligor during the continuance of the particular estate or term[9]. An advowson in fee, in gross, is also considered as assets[1], as is a rent in fee out of land before belonging to the heir, though the rent becomes extinct by the descent[2]. Before the statute of frauds,

[2] Plunket *v.* Penson, 2 Atk. 294.
[3] 4 Co. 22, a.
[4] 1 Roll. Ab. 269.
[5] Killow *v.* Roden, Carth. 129.
[6] Ibid. Kinaston *v.* Clark, 2 Atk. 204.
[7] Ibid.
[8] Plunket *v.* Penson, ub. supra.
[9] Vide Doed. Da Costa *v.* Wharton, 8 T. Rep. 2.
[1] Co. Lit. 374, b.
[2] Ibid.

(*g*) The defendant might plead this descent specially, and then at the common law the plaintiff could only have judgment of assets, *quando, &c.* Vide *Killow* v. *Roden*, Carth. 129; *Smith* v. *Angel*, 2 Ld. Raym. 784.

Part II. *Action against Heir, on Specialty.*

(29 Car. 2, c. 3.) estates *pur autre vie* were not considered as assets; but, by that statute (sect. 12.) they are made so when they descend to the heir as special occupant; the statute, however, (sect. 11.) provides that the heir in such case shall not, by reason of any kind of plea, be chargeable to pay the condemnation out of his own estate, but execution shall be sued of the whole estate so made assets in his hands by descent, in whose hands soever it shall come after the writ purchased, in the same manner as it is to be at and by the common law, where the heir pleads a true plea.

Another case which the defendant might set up at the common law to defeat the plaintiff's demand, and which will still avail him in an action against him as heir, is where the obligor has devised to him an estate materially different from that which the law would cast upon him; as where the devise is in tail[1], or to two daughters as joint-tenants in fee, instead of leaving them to take as coparceners[2]. But if the devisee take the same estate as he would have done by descent, or such estate subjected only to a charge[3], as where the testator devises to executors for a term of years in trust to pay debts, and then to his heir[4], or charges the land in his hands with his debts[5], or with a sum of money for rent[6], the law considers the heir as in of his better title, and the action may be maintained in the common form.

[1] Plowd. 545.

[2] Anon, Cro. Eliz. 421.

[3] Reading v. Royston, 1 Salk. 242.

[4] Hedger v. Rowe, 2 Stra. 1270.

[5] Allen v. Heber, Ibid.

[6] Clarke v. Smith, Com. Rep. 72.

Before the statute of 4 & 5 W. & M. the heir, if he had fairly alienated before action brought, (for covenous alienations were before rendered null by the stat. 13 Eliz.[7]) might defeat the action by pleading *riens per discent at the time of commencing the action.* Equity, it is true, gave relief to the creditor[8]; but, to avoid the necessity of going there, the statute 4 & 5 W. & M. c. 5, s. 5, enacted, that in such cases the heir should be liable to the value of the land sold, aliened,

[7] Vide post, 413.

[8] Coleman v. Winch, 1 P. W. 777.

aliened, or made over; and by the 6th sect. provided, that in case of such plea, the plaintiff might reply that the defendant had lands from his ancestor before the original writ brought, or bill filed; and if upon issue joined thereon, it should be proved for the plaintiff, the jury should inquire of the value of the lands, &c. so descended. The plaintiff, in this case, therefore, must, in addition to the evidence of seisin and descent, be prepared to prove the *gross* value of the land, and not content himself with the general judgment which he would be entitled to in the case of a general plea of *riens per discent*; and if this should be omitted, a *venire de novo* would be granted[1]. The plaintiff *may* reply in this way (to a plea so pleaded) even if the defendant has not aliened the land, but, by so doing, he can only take the judgment given by the statute, viz. against the defendant himself to the value of the land proved[2]; whereas, if he deny the plea generally, the proceedings are the same as at the common law, without any reference to the value of the land[3].

[1] Jeffrey *v.* Barrow, 10 Mod. 18.

[2] Redshaw *v.* Hester, Carth. 354.

[3] Mathews *v.* Lee, Barnes, 444.

If the defendant truly sets forth the whole of the lands descended to him[4], the plaintiff then takes judgment against those lands, and has a writ of inquiry to ascertain their yearly value, and the defendant is not personally liable; and when a judgment has been recovered against the obligor, the defendant may plead such judgment, or payment of other debts of equal degree, before the commencement of the plaintiff's action, though no judgment obtained. To avail himself, however, of these matters, he must state what lands in certain have descended to him[5]; and as the plaintiff replies, the issue will be thrown either on him to prove lands beyond those mentioned in the plea (as to which we have only to refer to what has been already said respecting the evidence on the general plea of *riens per discent*), or on the defendant to prove

[4] Rastell, 172, b. 173, a.

[5] Buckley *v.* Nightingale, 1 Stra. 665.

Part II.
Action against Heir and Devisees.

prove the fairness or payment of the former debt, as to which it may be sufficient to refer to observations already made in treating of actions against executors. It may, however, be here observed, that as a judgment not docketed is not binding on heirs, the plaintiff may, in case the defendant pleads a judgment outstanding against the obligor, reply it was not docketed [1].

[1] Steele *v.* Rooke, 1 Bos. & Pul. 307.

Having thus considered at some length the action which the common law gives against the *heir*, it will not be necessary to be very minute in treating of the action given by the statute of the 3 & 4 Will. & Ma. c. 14, which was made to extend the benefits of that action to cases where it would be defeated by the devise of the debtor.

That statute (sect. 2.) makes all devises or appointments of lands, rents, profits, term, or charge out of the same, whereof the testator is seised in fee-simple, in possession, reversion or remainder, or has power to dispose of the same by his last will and testament, fraudulent and void as against bond or specialty creditors; and (sect. 3.) enacts, that, in such case, every such creditor may maintain his action of debt on his bond and specialty against the *heir-at-law* of the obligor, and his *devisee or devisees jointly*; and that the devisee or devisees shall be liable and chargeable for a false plea in the same manner as any heir-at-law should have been for any false plea, and for not confessing the lands or tenements to him descended; and (sect. 7.) that the devisee shall be liable in the same manner as the heir-at-law, notwithstanding the lands devised to him shall be aliened before the action brought.

Devises or charges for payment of any real or just debt or debts, or any portions or sums of money for children, other than the heir-at-law, according to or in

in pursuance of any marriage contract or agreement in writing, *bonâ fide* made before the marriage, (by sect. 4.) are saved and declared to be in full force.

Ch. XIV. s. 4. *Action against Heir and Devisees.*

In this case, we have seen the action must be against the heir and devisee jointly; and on an action so framed, unless the devisees deny the devise, the plaintiff's evidence will be of the same nature in general as that before directed in the case of an action against the heir.

In the construction of this act it has been holden, that an estate *pur autre vie* is within it [1], and that the proviso contained in the 4th section operates in favour of all devises for payment of debts, though out of the rents and profits only [2]. In case of such devise being so complicated as not to be capable of being carried into effect, a court of equity would (as in many of the other cases before mentioned) grant relief, but a court of law could not take notice of the defect [3].

[1] Westfaling *v.* Westfaling, 3 Atk. 465.

[2] Plunket *v.* Penson, 2 Atk. 292.

[3] Hughes *v.* Dolben, 2 Bro. 614.

CHAP. XV.

OF THE EVIDENCE IN ACTIONS AGAINST OFFICERS OF JUSTICE.

SECTION I.

Against Sheriffs, Bailiffs, and Gaolers.

OFFICERS of justice are often liable to actions for irregular conduct in their official stations, and in most of these cases the evidence materially differs from that in actions against common persons.

Ch. XV. s. 1. *Actions against Officers.*

If trespass or trover be brought against a *bailiff*, for any thing done by himself, the evidence will be the same as against any other person; but as the *sheriff*

[387]

Part II. *Trespass against Sheriff for taking Goods.*

sheriff seldom does any act in person, he must be connected with the *bailiff*, before the acts of the latter can be evidence to charge his superior. In this case, therefore, the plaintiff must first give in evidence the warrant of the defendant, either by calling the bailiff to produce it, or else by proving that it has been returned to the sheriff's office; and then, after proving notice to produce it, a copy or parol evidence may be given of it (*a*). To obtain this evidence, it will be necessary to serve the bailiff with a *subpœna duces tecum*, or common *subpœna*, accompanied with a notice, as well as to give notice to the sheriff. Proof that the person who committed the trespass was the general bailiff of the defendant, and had given a bond of indemnity to him, will not be sufficient to connect him with the particular transaction [1]. The foundation being thus laid, the sheriff is civilly answerable for all the acts of his bailiff,

[1] Drake *v.* Sykes, Bart. 7 T. Rep. 113.

(*a*) This is the only regular evidence of a warrant; but, in some instances, where the original writ has been produced, and the name of the officer has been endorsed thereon by a person in the sheriff's office, this has been deemed sufficient. See *Blatch* v. *Archer*, Cowp. 63; and *M'Niel* v. *Perchard*, 1 Esp. 263.

The *Nisi Prius* decisions of different judges on this point, however, have been by no means uniform; but all seem to have agreed that the name of a particular officer being endorsed on the writ is not sufficient proof of such officer having been duly authorized to act under it without clear evidence that such endorsement was made by the under-sheriff, or some person ordinarily employed in his office to grant warrants or writs, and for the purpose of denoting that a warrant was granted to the officer so named. In some of the cases the point has been raised on an office copy of the writ being produced, but it should seem that this secondary evidence could only arise on the production of the writ itself, when the hand-writing itself could be spoken to. The reader who wishes to consult the cases, is referred to *Martin* v. *Bell*, 1 Stark. 413; *Hill* v. *Leigh*, 1 Holt, 216; *Morgan* v. *Bridges*, 2 Stark. 314; *Tealby* v. *Gascoigne*, 2 Stark. 202; *Hill* v. *Sheriff of Middlesex*, 7 Taunt. 8.

As to declarations or acknowledgments of the under-sheriff or bailiff, they do not seem to be admissible, except as part of the act done by them at the time. *Vide ante*, 21.

and

Trespass against Sheriff for taking Goods.

and proof that he seized the person or goods of *A.* under an execution against *B.* will support the action against the sheriff[1]; for though the authority has not been strictly followed by the bailiff, yet when once the sheriff has constituted him bailiff for that particular service, he is civilly answerable for all trespasses or mistakes committed by the bailiff in the supposed or pretended execution of it.

[1] Sanderson v. Baker, 2 Black. 832. Ackworth v. Kempe, Dougl. 40.

[388]

Fraudulent Assignments.

In actions brought against sheriffs or their bailiffs for seizing the goods of one man under an execution against those of another, the most usual defence is, that the goods were fraudulently assigned to the plaintiff by the third person, for the purpose of defeating the execution of a creditor. In this case the sale is fraudulent and void, as against such creditor; but in order to make it appear that he stands in that relation, the defendant must prove a copy of the judgment as well as of the execution; but had the party, against whom the writ issued, been plaintiff, a copy of the writ only would have been sufficient[2].

[2] Martin v. Podger, 5 Burr. 2631.

These cases have arisen upon the statute 13 Eliz. c. 5, which enacts, "that all and every feoffment, grant, alienation, bargain and conveyance of lands and tenements, hereditaments, goods and chattels, by writing or otherwise, and all and every bond, suit, judgment and execution had and made for any intent or purpose before declared, (viz. to delay, hinder, or defraud creditors and others of their just and lawful actions, suits, debts, &c.) shall be taken (only against them whose action, &c. by such covenous practice is disturbed, delayed or defrauded,) to be void; and every pretence, colour, feigned condition, expressing of use or other matter or thing, to the contrary notwithstanding: Provided, it shall not extend to any estate or interest in lands, tenements, goods or chattels, had, made, conveyed or assured

Part II.
Trespass against Sheriff for taking Goods.
Fraudulent Assignments.

assured upon good consideration and *bonâ fide* to any person not having, at the time of such conveyance or assurance, notice of such covin, fraud, or collusion."

Twine's case; 3 Co. 80.

Twine's case, which is referred to in all others as the leading case on this statute, occurred soon after the passing of it, viz. in the 24th Elizabeth; there, *A.* being indebted to *B.* in 400*l.* and to *C.* in 200*l.* *C.* brought an action of debt, and pending this action *A.* made a *secret* conveyance of *all his goods* to *B.* in satisfaction of his debt, but continued in possession, sold some of the goods, set his mark on some of the sheep, shore others, and acted to all intents and purposes as the owner of the goods. On this case the grant was held to be fraudulent as against *C.* and not within the proviso, for though for a good consideration it was not *bonâ fide*; and Lord *Coke*, in reporting this case, advises his readers thus, "Where any gift shall be to you in satisfaction of a debt, by one who is indebted to others also, 1st. Let it be made in a public manner and before the neighbours, and not in private, for secresy is a mark of fraud: 2d. Let the goods and chattels be appraised by good people to their very value, and take a gift in particular in satisfaction of your debt: 3d. Presently after the gift take possession of them, for continuance in possession by the donor is a sign of trust."

Bull.N.P. 258, cites Cas. K.B. 287 (*b*).

But though it may be taken as a general rule, that the continuing in possession is strong evidence of fraud, yet such is not universally the case. As if *A.* lend money to *B.* to enable him to purchase goods, and at the same time take a bill of sale of them for securing the money; here, the very intent of the transaction

(*b*) I find no such case in 12 Mod. which is the book generally cited as Cas. K. B. it is probable the author intended to refer to *Bucknal* v. *Royston*, Prec. in Chancery, 287, which is cited by him when delivering his judgment in *Edwards* v. *Harben*, 2 T. Rep.

transaction being that *B.* should have the possession, there is nothing fraudulent in such possession being continued by him.

So where *A.* being in debt, an execution issued against his goods, and they being put up to sale, a friend of *A.* became the purchaser, and took a bill of sale of the sheriff, but permitted *A.* to continue in possession, who afterwards executed another bill of sale to *C.* another creditor under which he took possession, it was held that the first bill of sale was valid, and that the person to whom it was made might recover against *C.* the value of the goods sold

Kidd v. Rawlinson, 2 B. & P. 59.

2 T. Rep. 517. "There one *Brewer*, having shipped a cargo of goods, borrowed of the plaintiff 600*l.* on bottomry, and at the same time made a bill of sale of the goods, and of the produce and advantage thereof, to the plaintiff. Sir *Edward Northy* cited a case, (*Smallcomb* v. *Buckingham*, vide post,) where a man took out execution against another by agreement between them, the owner was to keep possession of them upon certain terms, and afterwards another obtained judgment against the same man, and took the goods in execution, and it was held that he might, and that the first execution was fraudulent and void against any subsequent creditor, because there was no change of the possession and no alteration of the property; and he said it had been ruled forty times in his experience at Guildhall, that if a man sell goods and still continue in possession, as visible owner of them, such sale is fraudulent and void as to creditors, and that the law has been always so held. The Lord Chancellor held, in the principal case, that the trust of these goods appeared upon the very bill of sale, that though they were sold to the plaintiffs, yet they trusted *Brewer* to negotiate and sell them for their advantage, and *Brewer's* keeping possession of them was not to give a false credit to him as in the other cases which had been cited, but for a particular purpose agreed upon at the time of the sale." Mr. J. *Buller* had before observed, that "in cases where the possession was by the terms of the deed to remain in the vendor till a future time, or till some condition was performed, his continuance in possession until that time or until that condition was performed, was not fraudulent, because such possession was consistent with and accompanied and followed the deed;" and after citing the above case, added, "So that the Chancellor in that case proceeded on the distinction I have taken; he supported the deed because the want of possession was consistent with it." In the case of *Edwards* v. *Harben*, the bill of sale was absolute, and a formal possession was delivered, but the vendee verbally agreed that the vendor should remain in possession for fourteen days, and on account of this incongruity it was held to be void as against creditors.

by

Part II.

Trespass against Sheriff for taking Goods.

Fraudulent Assignments.

by him. And in another case, where the husband of the plaintiff's mother assigned his effects to trustees for the benefit of his creditors, and absconded, leaving his wife in possession of his house and goods, and notice of the assignment being advertized in the public papers, the goods were afterwards sold by public auction, and the plaintiff having purchased them, removed some, but permitted his mother to remain in possession of the greatest part of them. It was also held, that this possession was not fraudulent, so as to entitle a creditor who did not come in under the deed to take them in execution. In these cases it will be seen that the transaction was open and notorious, and the possession was not inconsistent with the declared intention of the parties (*c*).

Leonard *v.* Baker, 1 M. & S. 251; see also Deway *v.* Baynton, 6 East, 257.

Another

(*c*) Many cases have occurred on settlements made between husband and wife; the most modern, and which, on account of its great importance in point of value was the most discussed, was that of *Deway* v. *Baynton*, 6 East, 257. The circumstances of that case are too complicated to admit of a mere abstract principle, but the case itself is too important to be passed over without reference. It is thus abridged by Mr. *East*: "One who had a life interest in a settled estate of his wife (both of whom were aged) of at least 3,000*l.* a-year, whereof the ultimate reversion on failure of issue male (of which there was none) was in her, and having furniture and pictures, &c. in his mansion of not less than 8,000*l.* value, being pressed by his creditors, in pursuance of an agreement with his wife conveys all that his property to trustees (who had married his daughters) for the benefit of his wife and daughters, and subject to his wife's future appointment, in consideration whereof his wife discharged him of above 3,000*l.* before raised on the estate, principally for his use, and enabled the trustees to raise out of her estate 12,000*l.* more for the benefit of her husband's creditors, but subject to the appointment of him, his executors, &c. and also covenanted to levy a fine, which was levied a year afterwards, and the husband covenanted to deliver an inventory of the goods to the trustees within six months, which was not done; and after the conveyance the husband continued to use the furniture, &c. in the house, as before, and was soon afterwards sued by several of the creditors, whose executions against such goods were satisfied by him without setting up the trust deed or resorting to the trust fund, but money was raised on it afterwards for other creditors; and above two years after the deed the husband being sued by

Another class of cases which may be here noticed, are those where a man being indebted to one creditor, and apprehending process at his suit, gives a judgment or other security to another creditor, for the purpose of enabling him to recover his debt. This, if really done for the purpose, and not with a view of himself benefiting by the transaction, will not be considered as fraudulent within the statute, but be good against the other creditor, though expressly for the purpose of defeating his execution. Thus, where *A.* being sued by a creditor, confesses a judgment to another creditor, for a debt *bonâ fide* due to him [1], or for such a sum as will cover all his debts, directing a rateable proportion to be made [2], or assigns his effects to trustees for the like purpose, which trustees take possession accordingly [3], the creditor who first sued his debtor cannot afterwards levy the effects on the ground of the executions being fraudulent as against him.

[1] Holbird *v.* Anderson, 5 T. R. 235.
[2] Maud *v.* Howell, 4 East, 1.
[3] Pickstock *v.* Lyster, 3 M. & S. 371.

Another injury committed by the officer, for which the sheriff is civilly liable to make amends to the party, is that of *extortion*, which is punished by

by the plaintiff, a creditor before that time, the trust deed was set up in bar of the levy upon the goods in the house, and the sheriff returned *nulla bona*. And upon an action brought for a false return, held, that in the consideration of the question, whether this was a *bonâ fide* transaction, or a contrivance to defeat creditors, and therefore void at common law, or by the stat. 13 Eliz. c. 5, it is material to submit to the jury the relative value of property withdrawn from the reach of the creditors, in proportion to the amount of their demands at the time, and the value and tangibility of that substituted in its place, in aid of the conclusion that the deed was covenous against them; and therefore a verdict for the plaintiff, founded principally on those concomitant circumstances, 1st. the previous embarrassment of the husband; 2d. the want of notoriety of the conveyance at the time; 3d. the want of an inventory; 4th. the continuance of the husband's possession, though consistent with the deed, yet without notice of the change of property; and 5th. the appropriation by the husband of a part of the money raised by the trustees to his own use, without objection, was set aside, and a new trial granted to bring the question more fully before the court and jury, as to the good faith of the transaction, and the value of the consideration, and its availability to the creditors.

Part II. *Action for Extortion.*

several statutes. By the stat. 29 Eliz. c. 4, certain fees are given to sheriffs for levying *executions*; and by the 32 Geo. 2, c. 28, various other provisions are made to prevent the oppression of indigent defendants by the rapacity of bailiffs. If a bailiff offend against these statutes, the party injured has his election either to sue him or the sheriff[1], but he cannot recover penalties against both for the same offence[2]. If he sue the sheriff, he must in general prove the writ, warrant, and misconduct of the bailiff; but if the sheriff has returned the writ, and the extortion appear on the face of his return, the warrant is unnecessary (*d*). The same evidence should be given in the action against the bailiff. One of the offences enumerated in the latter act of parliament, is taking more than by law is allowed for waiting till bail is given, for which a penalty of fifty pounds is inflicted; but it has been holden, that no action can be maintained for this offence, without proving a regular table of fees, settled in pursuance of that act, which, I believe, has never yet been done[3].

[1] Woodgate v. Knatchbull, 2 T. Rep. 148.

[2] Peshall v. Layton and Marshall, Ibid. 712.

[389]

[3] Jaques v. Whitcomb, 1 Esp. Cas. 361. Martin v. Slade, 2 Bos. & Pul. N. Rep. 59.

False Return of Mesne Process.

For *false return* of *mesne process*, the declaration generally states the plaintiff's cause of action; that a writ issued and was delivered to the defendant, and that the defendant either did take the debtor, and afterwards permitted him to escape; or else that he might have taken him, but did not, and returned *non est inventus*. In this case, therefore, the first evidence will be the plaintiff's cause of action[4], in the same manner as if the action were against the original defendant, and therefore his acknowledgment will be admissible[5], next the writ and return (*e*) by an

[4] Alexander v. M'Cauley, 4 T. Rep. 611.

[5] Sloman v. Horne, 2 Esp. 695.

(*d*) If the judgment be stated in the declaration he must also prove that. *Savage* v. *Smith*, 2 Black. 1101.

(*e*) In *Webb* v. *Herne and another*, 1 Bos. & Pul. 281, where the declaration for an escape on mesne process alleged that the writ was endorsed for bail, *by virtue of an affidavit*, &c. the court held, that the affidavit should be proved, and that the production or proof

an examined copy of the original, filed of record, which is sufficient evidence of the writ itself, and of its delivery to the sheriff; then, the warrant to the officer, in the same manner as in the former instance; and, lastly, either that the defendant was once in the custody of the bailiff, or of his follower in his presence[1], and escaped from him; or else that notice was given to the sheriff, under-sheriff, or bailiff, where the defendant was, and that he might have been arrested had the officer thought proper to have taken him. But notice to the agent in London of a country under-sheriff will not be sufficient[2]. In order to show the amount of the damages which he has sustained, the plaintiff should also prove the circumstances of the defendant at the time of the arrest, and that he has since absconded, or become insolvent, for if the defendant were originally in bad circumstances, or he may be met with every day, and the plaintiff has not in fact been injured by this negligence of the defendant, the damages will be merely nominal[3].

[390]

[1] Blatch *v.* Archer, Cowp. 63.

[2] Gibbon *v.* Coggan, 2 Campb. 189.

[3] Tempest *v.* Linley, Clayt. 34.

Escape on Mesne Process.

If the sheriff make a return of *cepi corpus*, and the ground of complaint be that he had not the defendant forthcoming at the return of the writ, the plaintiff must prove his debt, the writ and return, which, admitting the caption, renders the warrant unnecessary. He must then prove that the defendant was at large, or in improper custody *after the return of the writ*[4], that no bail above was put in, and that by these circumstances he has been injured; for where a sheriff's officer kept a defendant in his custody some time after the return of the writ, and then took him to prison, yet as the plaintiff was not, in fact, delayed or injured, the action was holden not to be

[4] 2 Blac. 1048. Vide Atkinson *v.* Matteson, 2 T. Rep. 172.

[391]

proof of the writ, whereon the sum was endorsed, was not sufficient proof of this substantive allegation. But if it had only said, endorsed for bail for so much, then it would not have been necessary; and, in the other case, an examined copy would be sufficient. *Vide* Bul. N.P. 14.

Part II. *Action for False Return of Fieri Facias.*

maintainable [1]. This action is generally brought where the defendant has been permitted to go at large without a bail bond, and the court will not, in such a case, stay the proceedings upon the defendant putting in bail [2]; nor will putting in such bail, after the expiration of the term in which the writ is returnable, afford any defence to the action commenced before [3]; but if the defendant in the original action do, in fact, put in and perfect bail, or having put in bail render himself in their discharge before the time for bringing in the body is expired, the action is not maintainable although no bail bond has been taken [4].

In an action for a false return of the writ of *fieri facias*, the plaintiff must prove examined copies of the judgment, writ, and return, and give evidence of the warrant, as in other cases. He must then prove, that the debtor had goods within the county, and that due notice was given to the defendant, or his bailiff, of them. If the property of the goods is alleged to be in a third person, and the sheriff be indemnified by him to return *nulla bona*, the plaintiff must also be prepared to prove the property to be in the original defendant, by showing acts of ownership by him, or other conduct inconsistent with the claim which is set up.

In general the goods of the debtor are bound from the time of delivering the writ to the sheriff; but if the plaintiff, or his attorney, give directions to the sheriff not to levy till a future day, and in the mean time another writ be delivered to the sheriff, the plaintiff loses his priority; and the sheriff should levy on the second writ [5]. In this case, therefore, the sheriff may return *nulla bona* on the first writ, and support his return by proving the fact. So if a trader has committed an act of bankruptcy before the writ was delivered to the sheriff, or being in prison for debt at the time, remain there so long afterwards as

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[1] Plant *v.* Anderson, 5 T. Rep. 37.

[2] Fuller *v.* Prest, 7 T. Rep. 109. Webb *v.* Matthew, 1 Bos. & Pul. 225.

[3] Moses *v.* Norris, 4 Maule & Selwyn, 397.

[4] Pariente *v.* Plumptree, 2 Bos. & Pul. 35.

[5] Smallcomb *v.* Buckingham, Salk. 320. 1 Ld. Raym. 251, S. C. Bradley *v.* Wyndham, 1 Wils. 44. [392] Kempland *v.* M'Cauley, Peake's N. P. 65.

to make up two months, and a commission issue against him[1]; this by relation devests him of all property from the first, and the sheriff must not proceed to sell, though he had in fact levied the goods. Here also the sheriff must return *nulla bona*, and give evidence of the different facts necessary to support the commission, viz. the trading, act of bankruptcy, &c.

[1] Cooper *v.* Chitty, 1 Burr. 20. Chippendale *v.* Brigden, Bul. N. P. 41.

Where the action is brought against a sheriff for the *escape* of one in execution, the plaintiff may declare in debt; and if the sheriff, having returned *cepi corpus*, afterwards permitted the defendant to escape, the plaintiff must prove copies of the judgment, writ, and return. But if the escape were from the bailiff before the return, and the writ remain unreturned in the sheriff's hands, the writ itself may be produced. The plaintiff should also in this case prove the warrant, to show that at the time the debtor escaped from the bailiff, he was invested with that character. If the debtor, being in the county gaol, was charged with a writ of execution, by lodging it with the sheriff, it will be necessary to prove the fact of his so being in custody, at the time of the delivery of the writ; and to avoid the difficulty which might otherwise arise in this case, it is by stat. 8 & 9 W. 3, enacted, "That if any person or persons whatsoever, desiring to charge any person with any action or execution, shall desire to be informed by the marshal of the King's Bench, or warden of the Fleet, or their respective deputy or deputies, or by any other keeper or keepers of any other prison or prisons, whether such person be a prisoner in his custody or not, the said marshal or warden, or such other keeper or keepers of any other prison or prisons, shall give a true note in writing thereof to the person so requesting the same, or to his lawful attorney, upon demand at his office for that purpose, or, in default thereof, shall forfeit the sum of fifty pounds; and if such marshal or warden, or their respective deputy or

Sed vide Blatch *v.* Archer, Cowp. 63.

8 & 9 W. 3, c. 27, s. 9.

Part II. *Action for Escape of one in Execution.*

deputies exercising the said office, or other keeper or keepers of any other prison or prisons, shall give a note in writing that such person is an actual prisoner in his or their custody, every such note shall be accepted and taken as a sufficient evidence that such person was at that time a prisoner in actual custody."

Westby's case, 3 Co. 72.

In cases where the prisoner was in custody of a former sheriff, the assignment of the prisoners made by him to the defendant should also be proved; for the sheriff is only chargeable with such prisoners as are assigned, unless he come into office on the death of the old sheriff, in which case he must take notice of all prisoners in the gaol at his peril.

[394]

See Turner v. Eyles, 3 Bos. & Pul. 456, and cases there cited. Wigley v. Jones, 5 East, 440.

If the action be brought against the marshal of the King's Bench or warden of the Fleet, the plaintiff must prove the debtor to have been regularly committed to his custody by the court, which, in cases of *execution* it should seem, can only be done by proving an examined copy of the *committitur* entered of record; but where the debtor is committed on a *habeas corpus* charged with *mesne process*, the production of the *habeas corpus* itself, with the judge's commitment annexed to it, is sufficient evidence of such commitment, it being also proved that notice of it was given to the defendant by entering a memorandum of it in the book kept by him for that purpose.

Watson v. Sutton, Salk. 272.

When a defendant is in custody of the marshal, and is to be charged with a King's Bench execution, a rule is obtained for the marshal to acknowledge the defendant to be in his custody, and he is committed upon such acknowledgment. In this case, therefore, it would be proper to prove such acknowledgment on the trial; but if he be in custody of the warden of the Fleet, and is to be charged with a Common Pleas or Exchequer writ, a *habeas corpus* is obtained, the return to which proves the fact of his being in custody.

Hawkins v. Plomer, 2 Blac. 1048.

Having thus established the fact of the prisoner being in the defendant's custody, the plaintiff must next

next prove the escape from it, by evidence of the debtor having been afterwards seen at large; and in this case, whether his escape were before or after the return of the writ, the sheriff is equally liable to an action. He cannot permit him to be out of his own custody for a moment, and even where after the arrest the bailiff suffered the defendant to go about on two different days, in company with his follower, for the purpose of enabling him to settle his affairs, it was holden to be an escape[1]. So where a bailiff of a liberty having arrested the defendant, delivered him into the county gaol, this was determined to be an escape[2]. The evidence of the escape, as well as that of the custody, is rendered much more easy by the before-mentioned statute of 8 & 9 Will. 3, which enacts, "That if the marshal or warden, or their deputies, or the keeper of any prison, after one day's notice in writing for that purpose, shall refuse to show a prisoner committed in execution, to the creditor or his attorney, such refusal shall be adjudged an escape."

[395]

[1] Benton v. Sutton, 1 Bos. & Pul. 24.

Ibid.

[2] Boothman v. Earl of Surrey, 2 T. Rep. 5.

8 & 9 W. 3, c. 27, s. 8.

The defendant may put the plaintiff to the proof of all these facts by the plea of *nil debet*. He may also plead that the escape was against his will, and that he made fresh pursuit and retook the prisoner before the commencement of the plaintiff's action; but before such plea is received, affidavit must be made by the gaoler that the prisoner escaped without his consent or privity. This plea may be pleaded to an action charging a *voluntary* escape[3], for the plaintiff may, on such a count, give evidence of a *negligent* escape, and if it appear that the prisoner escaped from the rules of the King's Bench prison without the marshal's knowledge, that will not falsify the plea. The defendant may, also, where the escape has been against his will, plead and give in evidence that the prisoner returned into his custody before the

8 & 9 W. 3, c. 27.

[3] Bonafous v. Walker, 2 T. Rep. 126.

[396]

Ibid.

Part II.

Action for Escape of one in Execution.

commencement of the action, which is equivalent to a retaking by him, but in this case it must appear that the prisoner remained in custody till the commencement of the plaintiff's action; and, therefore, where the defendant pleaded generally that the prisoner returned, and that the defendant did thereupon then and afterwards keep and detain him, and the replication traversed the keeping and detaining *modo et formâ*, and the plaintiff proved that the prisoner again escaped, and died out of custody, the court held that he was entitled to a verdict [1].

[1] Chambers *v.* Jones, 11 East, 406.

The law in this case is extremely severe on gaolers, for, if the prisoner cannot be retaken on a fresh pursuit, no excuse is admitted but the act of God, or the king's enemies. The destruction of his prison by a riotous mob [2], the secret escape of an alien from his custody [3], or a rescue from his officers, while obeying the commands of a *habeas corpus* [4], furnish no defence to this action, though no actual negligence is imputable to him.

[2] Elliott *v.* Duke of Norfolk, 4 T. Rep. 789.

[3] Alsop *v.* Eyles, 1 H. Bl. 108.

[4] O'Neil *v.* Marson, 5 Bur. 2812.

The plaintiff is, in this action, entitled to recover all money which is due to him from the prisoner; and, therefore, the circumstances of the defendant are not material to be proved [5].

[5] Vide 2 Black. 1048, and 2 T. Rep. 126.

Action for taking insufficient Sureties in Replevin.

Another injury which a person may sustain by the tortious or negligent act of the sheriff or his deputies, and for which the law gives an action, is the taking insufficient sureties on granting a replevin of a distress for rent. The statute 11 Geo. 2, c. 19, s. 23, enacts, that all sheriffs and other officers, having authority to grant replevin, shall, in any replevin of a distress for rent, take from the plaintiff, and two *responsible persons*, as sureties, in their own names, a bond in double the value of the goods distrained, conditioned for prosecuting the suit with effect and without delay, and for duly returning the goods and chattels distrained in case a return shall be awarded.

For

Action for taking insufficient Sureties.

For a neglect of duty in this particular, the sheriff, under-sheriff, and replevin clerk are all liable [1]; and a bailiff who makes cognizance may maintain the action, as well as a person who is the actual landlord [2].

[1] Richards *v.* Acton, 2 Blac. 1220.

[2] Page *v.* Eamer, 1 B. & P. 378.

In order to sustain this action, the plaintiff should prove the several facts averred in his declaration; viz. the taking the distress, the replevin made, the bond, and the insufficiency of the sureties.

The replevin will be proved by the sheriffs or replevin clerks; precept or warrant, as formerly directed when speaking of executions, &c.; and the bond by the subscribing witness. At one time slight evidence of the insufficiency of the sureties appears to have been considered sufficient [3]; but modern decisions have much narrowed the liability of sheriffs in this particular; and it is now held, that if the sureties taken by the sheriff are of apparent responsibility, he is not answerable to the landlord, though he neglected to inquire into their actual sufficiency [4], so that some evidence should be adduced to show either that the sheriff or his officer actually knew of the insufficiency of the sureties; or that their habits of life were so low, or their insolvency so notorious, as must necessarily have raised a suspicion of their sufficiency in his mind.

[3] Saunders *v.* Darling, Bul. N. P. 60.

[4] Hindal *v.* Blades, 5 Taunt. 225.

There have been some differences of opinion as to the extent of the sheriff's liability in this case. The Court of King's Bench in two instances [5], and the Common Pleas in one [6], determined that he was only liable to the value of the goods distrained; but in another case, the latter court held that he was liable to the extent of the penalty in the bond.

[5] Gea *v.* Lethbridge, 4 T. R. 433. Wilkinson *v.* M'Cauley, Ib.

[6] Evans *v.* Brander, 2 H. B. 547.

On principles somewhat similar to the last, is the action founded on the statute 8 Anne, c. 14, s. 1, which enacts, that no goods or chattels upon any messuages, lands, or tenements, leased for life, term of years,

Part II.

Action for selling without paying the Landlord's Rent.

years, at will, or otherwise, shall be liable to be taken by virtue of an execution, on any pretence whatsoever, unless the party at whose suit the said execution is sued out, before the removal of such goods from off the said premises by virtue of such execution or extent, pay to the landlord of the premises, or his bailiff, all such sums of money as are due for rent for the said premises at the time of such taking of the goods, provided the arrears of rent do not amount to more than one year's rent.

Vide ante, 201.

To support this action, the plaintiff must prove the demise as stated in the declaration, the levy made under the sheriff's warrant, and that notice of the arrear was given to the sheriff, under-sheriff, or bailiff[1], and the value of the goods seized.

[1] Smith v. Russell, 3 Taunt. 400.

This will entitle him to the amount of a year's rent, provided the goods will extend so far, and so much were due at the time the levy was made, but not to any rent accruing due after the seizure, though while the sheriff was in possession[2], and this even in the case of a seizure of growing corn, which must necessarily remain on the premises to ripen[3].

[2] Hoskins v. Knight, 1 M. & S. 245.

[3] Gwilliam v. Barker, 1 Price, 274.

In regard to the species of execution against which the landlord is thus protected, it has been held that an outlawry in a civil suit[4], an execution for the costs of a nonsuit[5], and even a seizure under a commission of bankrupt[6], are within the statute; but that the prerogative process of an extent in aid is not[7]: and though the plaintiff would be protected against the assignees of a bankrupt, yet if the sheriff seise under an execution, and such execution is overhauled by a commission, the sheriff will not be allowed to deduct the year's rent due to the landlord in an action by the assignees, unless he has actually paid it over before notice of the commission[8].

[4] St. John's College v. Murcox, 7 T. Rep. 259.

[5] Henchet v. Kimpson, 2 Wils. 140.

[6] Buckley v. Taylor, 2 T. Rep. 600.

[7] Rex v. De Cann, 2 Price, 27.

[8] Lee v. Lopes, 15 East, 230.

SECTION II. [397]

Against Justices, Constables, and Revenue Officers.

Ch. XV. s. 2. *The Statutes relating to Justices and Constables.*

In actions against officers of the criminal and revenue law, some previous steps are rendered necessary by the positive rules of several acts of parliament, which the plaintiff must be prepared with evidence to show he has complied with. By statute 21 Jac. 1, c. 12, actions against justices of peace, mayors, bailiffs, churchwardens, overseers of the poor, constables, and other peace officers, or persons acting in their assistance, or by their command, must be brought in the proper county. By statute 7 Jac. 1, c. 5, (made perpetual by the other act) the defendant may give every thing in evidence on the general issue (*f*). And, by 24 Geo. 2, c. 44, s. 1, no writ can be sued out against a justice for what he does in the execution of his office, till notice in writing of such intended writ has been delivered to him, or left at his usual place of abode, by the attorney or agent of the party who intends to sue, one [398] calendar month before the suing out the same; in which notice must be contained the cause of action, and on the back of which must be endorsed the name and place of abode of such attorney or agent. By sect. 3, the plaintiff must be prepared to prove the notice on the trial; and, by sect. 5, he is precluded from giving evidence of any cause of action not contained in it.

(*f*) By statute 42 Geo. 3, c. 85, s. 6, the provisions of this statute of 21 Jac. 1, are extended to persons holding, exercising, or being employed in any public employment, office, station, or capacity, either *civil or military*, either in or out of this kingdom, who have, by virtue of such public employment, office, &c. power to commit persons to safe custody, except that the plaintiff is permitted to state any thing done out of this kingdom to have been done at Westminster.

By

By the same statute, (sect. 6.) no action can be brought against any constable, or any other person acting by his order, or in his aid, for any thing done in obedience to a justice's warrant, under hand and seal, until demand made or left at the usual place of his abode, by the party intending to bring such action, or by his attorney or agent, in writing, signed by the party demanding the same, of the perusal and copy of such warrant, and the same has been refused or neglected for the space of six days after such demand; and in case, after such demand and compliance therewith, by showing the said warrant to, and permitting a copy to be taken thereof by the party demanding the same, (which, it has been holden, may be done any time before the action is commenced, though after the expiration of six days), an action be brought against the constable, &c. without making the justice a defendant, on producing or proving such warrant at the trial, the jury are to give a verdict for the defendant, notwithstanding any defect of jurisdiction in the justice. And if the action be brought jointly against the justice and the constable, then, upon proof of the warrant, the jury are to find for the latter, notwithstanding such defect of jurisdiction; and if they find against the justice, the plaintiff is to recover the costs he is to pay to such defendant against the justice. If the judge certify that the injury was wilfully and maliciously done, the plaintiff is (by sect. 7.) entitled to double costs; and the same advantage is given to the defendant, in case of his success, by the before-mentioned statute 7 Jac. 1, c. 5. The action must, by the statute 24 Geo. 2, c. 44, s. 8, be brought within six calendar months, but if any part of the imprisonment under a warrant be within six months, the justice is liable to an action *pro tanto*.

Jones *v.* Vaughan, 5 East, 445.

[399]

Justices

Justices are still further protected by a late act of parliament, which enacts, that in all actions whatsoever, which shall thereafter be brought against any justice or justices of the peace in the United Kingdom, for or on account of any conviction by him or them had or made, under or by virtue of any act or acts of parliament in force in the said United Kingdom, or for or by reason of any act, matter or thing whatsoever, done or commanded to be done by such justice or justices, for the levying of any penalty, apprehending any party, or for or about the carrying of any such conviction into effect, in case such conviction shall have been quashed, the plaintiff or plaintiffs, in such action or actions, besides the value and amount of the penalty or penalties which may have been levied upon the said plaintiff or plaintiffs, in case any levy thereof shall have been made, shall not be entitled to recover any more or greater damages than the sum of two-pence, nor any costs of suit whatsoever, unless it shall be expressly alleged in the declaration in the action wherein the recovery shall be had, and which shall be in an action upon the case only, that such acts were done maliciously, and without any reasonable or probable cause.

43 Geo. 3, c. 141.

[400]

In cases where malice is thus alleged, it will be important to prove in evidence, not only the circumstances really attending the case of the plaintiff, but also what passed before the magistrate; for though the prosecution may have been wholly without foundation, yet the magistrate may have been blameless upon the evidence laid before him.

Burley v. Bethune, 4 Taunt. 580.

And, by the second section of the same act, it is enacted, that the plaintiff shall not be entitled to recover against such justice any penalty which shall have been levied, nor any damages or costs whatever, in case such justice shall prove at the trial that such plaintiff was guilty of the offence whereof he had been

Part II. *The Statutes relating to Revenue Officers.*

been convicted, or on account of which he had been apprehended, or had otherwise suffered, and that he had undergone no greater punishment than was assigned by law to such offence.

Massey v. Johnson, 12 East, 67.

This act of parliament extends to all cases of convictions, whether a pecuniary penalty or a corporal punishment is inflicted; and if the party be duly convicted, the formal record of conviction may be drawn up any time before the trial of the action.

Officers of the *excise* (by 23 Geo. 3, c. 70, s. 30, &c.) and those of the *customs* (by 24 Geo. 3, c. 47, s. 35.) are protected by nearly the same regulations as were made by the previous statutes in favour of justices. A month's notice (*g*) is to be given, which is to contain the cause of action, and the names and places of abode of the person who is to bring the action, and of his attorney or agent. The *venue* is confined to the proper county, and the defendant has the advantage of the general issue. In two respects only they differ from the others, both of which are more favourable to them, viz. the action must be brought within *three* months, and the defendant, in case of the plaintiff's failure, recovers *treble* costs.

[401]

These statutes have received the most liberal construction in favour of officers of justice. They extend to every case where a man acts *bonâ fide* in the supposed execution of his duty, though he has transgressed the rules of law, and was not authorized to do the act complained of. And even if one magistrate act alone in a case where the law requires the concurrence of another magistrate, he is still entitled to notice.

Heller v. Toke, 9 East, 365.

If an *excise officer* assault an innocent man, whom he suspects of being a smuggler, employed in running

(*g*) The day on which the notice is given is included in the reckoning, and therefore if the notice be given on the 28th April, the writ may be sued out on the 28th May. See *Castle* v. *Burdett*, 3 T. Rep. 623.

goods,

goods, no action is maintainable without this notice[1]; but if he make his official station a mere pretence, as if he seize goods not liable to seizure, and extort money for the return of them, no notice is necessary previous to the commencement of an action of *assumpsit* to recover back the money[2]. So if a conviction before a justice of peace be quashed, *assumpsit* lies against the constable to recover back the money levied without notice[3]. And these statutes being only made to protect the officer against actions which go to charge him with the payment of money by way of damages, for an irregular execution of his office, have been held not to extend to actions of replevin[4]. The *constable* is entitled to a demand of a copy of his warrant only when he acts in obedience to it; if he act without one, or exceed the authority conferred on him by it, he is not within the protection of this clause of the statute. As if, under a general warrant to seize the authors, printers, and publishers of a libel, he apprehend the plaintiff, who is not specifically named[5]; or break into a house, and break the windows, under a common warrant to levy a poor rate[6]; or, if being directed by the warrant to levy the goods of the plaintiff, described as being of the parish of *G.* in the county of *K.* and, in fact, that part of the parish in which the plaintiff resides is not in the county[7]; or if the constable of one hundred execute a warrant, directed by name to the constable of another hundred, the action may be brought without any demand[9]. But where the justice, by his warrant reciting that sugars had been stolen, and that there was reason to believe they were concealed in the plaintiff's house, directed the constable to search for and secure them, and the constable did seize sugar there, which, in fact, had not been stolen, it was holden that he was entitled to notice, as having acted within the warrant[8]. And it should be observed,

[1] Daniel *v.* Wilson, 5 T. Rep. 1.

[2] Irving *v.* Wilson, 4 T. Rep. 485.

[3] Feltham *v.* Terry, Bul. N. P. 24.

[4] Fletcher *v.* Wilkins, 6 East, 283.

[402]

[5] Money *v.* Leach, 1 Blac. 555. 3 Burr. 742. S. C.

[6] Bill *v.* Oakley, 2 M. & S. 259.

[7] Milton *v.* Green, 5 East, 233.

[8] Blatche *v.* Kemp, 1 H. Black. 15, n.

[9] Price *v.* Messenger, 2 Bos. & Pul. 158.

Part II. *Construction of the Statutes.*

served, that though where the constable exceeds the authority given him by the warrant, he is not within the sixth section of the statute, which requires a notice, yet that he is so far within the protection of the statute, as to make it necessary for the plaintiff to commence the action within six months, pursuant to the eighth section thereof [1]. Whether, when he acts without any warrant at all he is so protected, does not appear to be clearly settled [2]. It would probably be so held if the point were to be expressly raised, though a *nisi prius* decision of Lord *Kenyon* is to be found to the contrary [3].

[1] Parton *v.* Williams, 3 B. & A. 330. Smith *v.* Wiltshire, 2 Brod. & B. 619.

[2] Parton *v.* Williams, 3 B. & A. 330; and 3 Esp. 226.

[3] Postlewaite *v.* Gibson, 3 Esp. 226.

Where a man sustains two characters, either of which entitles him to do an act, he may apply the act which he does to either of those characters, and claim the advantages of it [4]; and, therefore, where a lord of a manor, who as such is entitled to seize the gun of an unqualified person, exercises that right, and he is also a justice of the peace within the county, no action is maintainable without notice, for the act will be referred to his authority as a justice.

[4] Briggs *v.* Evelyn, Barr. 2 H. Blac. 214.

Not only must the notice be given, but the form prescribed by the legislature must be strictly followed; notice that an *action* will be commenced, is not sufficient; the nature of the *writ* or *process* that is intended to be sued out must be particularly specified [5]; and though the plaintiff need not state the *form* of action he intends to adopt, but will satisfy the statute by stating the cause of it, yet it has been said, that if he does state one form, and adopts another, the notice is invalid [6]. Thus, a notice of an intended action *on the case*, for false imprisonment and assault, has been determined not to be sufficient to enable the plaintiff to give evidence on a declaration for *trespass* and false imprisonment [7]. We have seen that the statute protecting justices, also requires the name and place of abode of the attorney or agent to be

[403]

[5] Lovelace *v.* Curry, 7 T. Rep. 631.

[6] Sorbin *v.* De Burgh, 2 Camp. 197.

[7] Strickland *v.* Ward, 7 T. Rep. 631, note (*c*), and 638, note (*a*). Sed qu. vide 2 Bos. & P. 552, note.

be endorsed on the back of the notice. The surname, with the initial letter of the christian name, has been deemed a compliance with the statute in this particular[1]; but if the place of abode be not directly stated, it is fatal. As where the attorney signed, "Given under my hand at Durham," the notice was holden to be bad, because this was not a direct allegation that he resided at that place[2]; but where the attorney signed his name, *W. S.* of Birmingham, it was deemed sufficient, though the particular street was not named[3]; it being enough if the direction be so certain as to enable the defendant to make a tender. The statutes for the protection of excise officers, require not only the name and place of abode of the attorney to be mentioned, but that of the party also, and therefore his place of abode at the time of giving the notice, as well as that at the time of the injury, must be mentioned in the notice[4]; but if it describe two partners, one of *A.* and the other late of *A.* that is sufficient[5].

[1] Mayhew *v.* Locke, 7 Taunt. 63.
[2] Taylor *v.* Fenwick, 3 Bos. & Pul. 553, note (*a*), and 7 T. Rep. 634.
[3] Osborne *v.* Gough, 3 Bos. & Pul. 551.
[4] Williams *v.* Burgess, 3 Taunt. 157.
[5] Wood *v.* Folliot, 3 B. & P. 552.

Time of commencing the Action.

The *general issue* being given in all these cases, the plaintiff should, in cases where the record does not show the action to have been commenced within the time of limitation, be prepared with the writ to produce in court, and if the defendant were not served with the first writ, it must be connected with the second, as was before directed in the instance of actions on penal statutes. If the plaintiff be imprisoned for a length of time, he has six months from the end of his imprisonment to bring his action[6]. But it has been holden, that an action against a custom-house officer for seizing goods, must be brought within three months after the actual seizure, notwithstanding a suit instituted in the Exchequer for condemnation of the goods, which is depending at the expiration of the three months[7]. And in the other case, of a continuing cause of action, if the plaintiff

[404]

[6] Pickersgill *v.* Palmer, Bul. N. P. 24. Massey *v.* Johnson, 12 East, 67.
[7] Godin *v.* Ferris, 2 H. Blac. 14.

Part II.
Time of commencing the Action.

give a notice, and thereby confine himself to the trespass therein mentioned, he must show either that the writ, with which the defendant was served, issued within six months after the trespass mentioned in the notice [1], or that it is a continuance of a writ sued out within that time; the mode of showing which has been before spoken of [2]. After this preliminary evidence, the plaintiff is at liberty to prove his trespass, as in other cases, either by showing the act done by the defendant himself, or by the warrant in the case of a justice, and this *prima facie* case will in general call for an answer from the defendants, and throw the *onus probandi* upon them. Thus it has been holden, that where an action of trespass is brought against a custom-house officer for seizing goods, it is incumbent on the defendant to show that the duty has not been paid [3]; and that even a condemnation of the goods before *commissioners of excise* will not dispense with the necessity of this evidence [4]. But, by a statute since made, it is enacted, that, in such case, the proof of payment of the duties shall lay upon the plaintiff and not upon the officer [5]. If the officer prove a condemnation in the *Exchequer*, this is conclusive evidence that the property is vested in the king, and a complete bar to the action [6]. But though in the action against the *excise officer*, the court decided that a condemnation before the commissioners did not conclude the plaintiff, yet, in an action against a *justice* it has been holden [7], that if he prove his warrant, and conviction of the plaintiff of any offence within his jurisdiction, it will be conclusive evidence in his favour, till reversed or quashed, and that the propriety or justice of it cannot be controverted at *Nisi Prius*; nor can any evidence of facts not in proof before the justice be adduced to show that the justice exceeded his jurisdiction [8]; but if the justice had no jurisdiction, or knowingly exceeded it, as

[1] Weston *v.* Fournier, 14 East, 491.

[2] Ante, 291.

Defendant's proof. Conviction.

[3] Saloman *v.* Gordon, 2 Black. 813.

[4] Henshaw *v.* Pleasance, Ib. 1174.

[5] 23 Geo. 3, c. 71, s. 55.

[6] Scott *v.* Shearman, 2 Black. 977.

[7] Strickland *v.* Ward, 7 T. Rep. 633; 12 East, 75. Gray *v.* Cookson, 16 East, 13.

[405]

[8] Brittian *v.* Kinnaird, 1 Brod. & Bing. 432. Lowther *v.* Earl of Radnor, 8 East, 113.

Defendant's proof.

Conviction.

as where having convicted a man of one offence in exercising his ordinary calling on a Sunday, he afterwards convicted him of another such offence on the same day, which could not possibly be committed, the second conviction being absolutely void, an action lies at the suit of the party injured, without quashing it[1]; and the like decision took place where justices having summoned a late overseer to deliver up a particular book belonging to the parish, committed him, on his refusal to do so, until he should have delivered up all books belonging to the parish; such adjudication and commitment, beyond the terms of the original complaint, making the warrant void *in toto*[2]. It has been said, that in actions of this kind, the justice is obliged to show the regularity of his proceedings, and that the informations, &c. upon which his conviction was founded, must be produced and proved in court[3]; but it seems to be now clearly settled, that the conviction itself is sufficient when drawn up in form, though done immediately before the time of its production in court[4].

[1] Cripps *v.* Durden, Cowp. 640.

[2] Groome *v.* Forrester, 5 M. & S. 314.

[3] Hill *v.* Bateman, 2 Stra. 710.

[4] Vide Massey *v.* Johnson, 12 East, 67; and the cases of Strickland *v.* Ward, and Gray *v.* Cookson, ante, 434.

Tender of Amends.

It may be proper to add, to what has been already said respecting these actions, that the justice may, by the stat. 24 Geo. 3, c. 44, s. 2, and the excise and custom-house officers by the statutes before alluded to, within one month after the notice, tender amends to the party, or to his agent or attorney, and in case it is not accepted, plead such tender in bar, together with the general issue; and if the jury find it to be sufficient, the defendant shall have a verdict; and if the justice or excise officer shall have neglected to have tendered any amends, or not tendered sufficient, he may, at any time before issue joined, pay such sum into court as he shall see fit, whereupon such proceedings, &c. shall be had as in other cases where a defendant is permitted to pay money into court.

Part II.

[406]

Tender of Amends.

Where the defendant pleads a tender, the plaintiff may either reply that there was no tender, or that the sum tendered was not sufficient; in the one case, the issue will be on the defendant; in the other, the evidence will be the same as if the cause had stood on the general issue.

CHAP. XVI.

OF THE EVIDENCE IN ACTIONS BY AND AGAINST ECCLESIASTICAL PERSONS.

SECTION I.

In Actions by the Patron or Parson to try the Title to, or obtain Possession of the Church.

Ch. XVI. s. 1.

Quare impedit.

I. WHEN the title to present is disputed, and the bishop admits the clerk of one patron in preference to the other, or on account of the dispute refuses to admit either, the patron whose clerk is refused admission brings his *quare impedit* against the bishop, the other patron, and his clerk. In this action the pleadings are special; the declaration states the title of the plaintiff; that he is seised of a manor to which the advowson is *appendant*; or of the advowson

[407]

itself *in gross*, as the case may be; that he, or those under whom he claims, have presented on a former occasion; that the clerk so presented has been instituted and inducted into the living; and that the church having become void, his right has been disturbed by the defendant. The defendant, viz. the other patron, (for the bishop and clerk usually disclaim any title,) sets out, in his plea, his own title, and

and concludes with a traverse of some fact in the declaration, generally the plaintiff's seisin of the manor, the appendancy of the advowson to it, or the plaintiff's seisin of the advowson in gross. Ch. XVI. s. 1. *Quare impedit.*

On pleadings so framed the plaintiff must be prepared with evidence to support his claim as stated in the declaration (*a*). He must prove at least one presentation by himself, or those from whom he derives title, and that the clerk so presented was duly instituted and inducted into the living. To show this he should produce and prove, by the subscribing witnesses, the presentation and letters of institution, and also prove the induction by some witness present at the time (*b*), or at least prove, that the person so instituted continued in peaceable possession of the church. If the letters of institution are lost, the bishop's register should be produced, and as a presentation may be by parol, that alone has been holden to be sufficient; and where a blank was left for the name of the patron parol evidence was received to show who was the person actually presenting. In cases where there is reason to apprehend evidence of title in the defendant, it will be proper to prove as many instances of presentation as possible; for, as this is the only way of exercising the right, every instance gives additional strength to the title. But if the defendant merely plead the general issue, viz. [408] Vide ante, 121. Hob. 163.

(*a*) It has been usual to insert but one count in a declaration in *quare impedit*, and when the defendant could demand oyer of the original writ, and avail himself of any variance between that and the declaration, there might have been great difficulty in doing otherwise; but now that oyer of the original writ cannot be obtained, there does not seem to be any objection to the plaintiff stating his title in a variety of ways so as the more certainly to avoid a variance between his pleading and his proof. In a very recent instance a declaration was so drawn, and no objection made to it. *Birch* v. *Bishop of Litchfield and Coventry*, 3 Bos. & Pul. 444.

(*b*) As to the manner of *induction*, and the different acts necessary to be done, see Burn's Ecclesiastical Law, tit. *Benefice*.

Part II. *Quare impedit.*

that he did not disturb, the title does not come in question, and the plaintiff may either have judgment or go for damages by proving the disturbance, to show which he must prove the presentation, the bishop's refusal, and the institution or presentation of the other clerk.

Vaughan, 6, &c. Hob. 163.

The defendant, in cases where his clerk also has been refused admission, must not only be prepared with evidence to controvert the title of the plaintiff, and show that the former presentation was an usurpation upon his right; but must also support his own title, by the like evidence as was necessary on the part of the plaintiff, because, in this case, both parties are actors, and if the verdict be found for the defendant, and his title established, he is entitled to have his clerk admitted.

[409]

Co. Lit. 282, a.

If the issue be upon the avoidance, the manner in which it is stated is not very material; an avoidance by the death of the last incumbent will support an allegation of an avoidance by privation; and if the allegation on the other hand be, that the church

Dyer, 377, b.

became void by his death, it may be shown, that he has taken another living without the necessary dispensation, for the *manner* of the avoidance is not the

Ibid.

title of the plaintiff, but the avoidance itself. In cases where the acceptance of another living is made the ground of the action, it must be proved, that the parson *subscribed* the thirty-nine articles upon his appointment to the second benefice, for unless he has so done, although instituted and inducted into it,

Shute v. Higden, Vaughan, 129.

he never became lawful parson of it; and therefore did not avoid the first, though the fact of his afterwards officiating as parson, would now probably be

Vide ante, 24.

considered as evidence of his having so subscribed. But if he has *subscribed* the articles on his appointment to the second living, though he may afterwards forfeit it, by not *reading* them within two months after

after his induction, yet the first living becomes void. Ch. XVI. s. 1 *Quare impedit.*

By the stat. 36 Geo. 3, c. 83, s. 3, curacies augmented by queen Anne's bounty, are to be considered as benefices presentative, so as that the licence thereto shall operate in the same manner as institution to such benefices, and shall render voidable other livings in like manner, as institution to the said benefices. In case of the avoidance of the living, by the acceptance of *such* a curacy, it must be proved, that it has been in fact augmented. But to establish this fact, it will be sufficient to prove the order for the augmentation, entered in a book, signed by the governors, according to stat. 1 Geo. 1, stat. 2, c. 10, s. 20, without going on to prove that the money was afterwards laid out in land and allotted by deed, under the corporation seal of the governors, and that such deed was enrolled within six months after its execution, as required by the act. Doé dem. Graham v. Scott, 11 East, 478.

In cases of this kind it may be necessary for the defendant to prove his dispensation as chaplain to some nobleman; and it should seem, that unless the retainer be lost, it should be proved like other instruments by the production and evidence of the subscribing witness; it has, however, been said, that the oath of any person who has seen the retainer under hand and seal is good; but that a copy of it, entered in the court of faculties, is not sufficient. [410] Lit. Rep. 1.

If the issue be proved for the plaintiff the jury should inquire, 1st, Whether the church be full, and if so, upon whose presentation; for if upon the defendant's presentation, the clerk is removeable. 2dly, The value of the living to enable them to assess damages according to the statute of Westminster. 3dly, In case of plenarty upon an usurpation, whether six calendar months have passed between the times of the avoidance and bringing the action,

Part II. *Quare impedit.*

for, if that time has passed, the case will not be within the statute, which only permits a usurpation to be devested by a writ brought *infra tempus semestre*. These facts are seldom matters of dispute in the cause; but, unless admitted, the plaintiff should be prepared with evidence to ascertain them.

Ejectment.

II. Where the parson has been admitted, instituted, and inducted into the living, and any person afterwards keeps possession of the parsonage-house, or glebe, or continues to receive the tithes, *ejectment* is the proper remedy to recover the possession. In this action he must prove his admission, institution, and induction; and it was formerly holden to be necessary for him to prove also that he had read and subscribed the thirty-nine articles, according to the statute, and declared his assent and consent to all things contained in the Book of Common Prayer. Of this, however, he is not now compelled to give evidence, unless some ground be laid by the defendant to show that he has not complied with those requisites; for, the presumption is, that every man has conformed to the law, until there is some evidence to the contrary. Neither is the plaintiff obliged to prove any title in his patron, for institution and induction, though upon the presentation of a stranger, is sufficient to put the rightful patron to his *quare impedit*.

Snow dem. Crawley v. Phillips, 1 Sid. 220.

[411]

Powell v. Milbank, 3 Wils. 355. 2 Blac. 851, S. C.

Vide Bul. N. P. 105.

SECTION II.

In Actions for Tithes.

Sect. 2. *Action for Tithes.*

WHERE the tithes have been taken by the defendant under an agreement and composition with the plaintiff, *assumpsit* on the contract is the proper remedy;

remedy; and no further evidence is necessary in this case than the occupation of the defendant, his contract with the plaintiff, and the retaining of his tithes in consequence of such contract.

But where there is no existing contract, and the farmer has neglected to set out his tithes, or has made a fraudulent and colourable severance, and then carried them away, the proper remedy for *predial* tithes, viz. corn, hay, and such like things, which arise immediately from the earth, is, by action of debt, founded on the stat. of 2 & 3 Edw. 6, c. 13, which, in such case, gives treble the value of the tithes withheld; and when the single value found by the jury, does not exceed 20 nobles (6*l.* 13*s.* 4*d.*) the stat. 8 & 9 W. 3, c. 11, gives the plaintiff his costs. But if the jury find the single value above that sum, or an arbitrator awards even less, or the plaintiff declaring for less the defendant suffers judgment by default, so that the value is not "found by the jury," within the words of the latter statute, no costs are payable by the defendant[1].

[412]

[1] Barnard v. Moss, 1 H. Black. 107.

In ordinary cases it will be sufficient in this action for the plaintiff to prove himself in possession of the rectory or tithes, without entering into his title[2]; as, where he has been some time in the uninterrupted receipt of tithes from the different landholders in the parish, and no one has disputed his title; and if the rector of *A.* has for a length of time been in the undisturbed receipt of tithes arising from a particular close in the parish of *B.* that will also be *prima facie* evidence of his title to such tithes[3]. But the mere circumstance of his having, as farmer of the tithes, called a meeting of the parishioners to treat with them as to a composition, when no agreement took place in consequence, is not sufficient, although no one at that meeting disputed his title[4]. In cases, therefore, where no acknowledgment of his title has taken

[2] Vide Bul. N. P. 188.

[3] Barnes v. Messenger, 13 East, 251.

[4] Wyburd v. Tuck, 1 Bos. & Pul. 458.

Part II. *Action for Tithes.*

taken place, he must prove it. If he claim as parson, he must prove his ordination by the bishop, his institution and induction into the living, and, as said in some books[1], his subscription to the declaration in the act of uniformity in the presence of the bishop, and his reading the thirty-nine articles within two months, and declaring his assent to them. This latter evidence, however, since the case of *Powell* v. *Milbank*, does not seem to be strictly *necessary, until the contrary is shown* by the defendant[2]. If the plaintiff sue as a lay impropriator, the strict proof of title is to show that the rectory originally belonged to one of the dissolved monasteries, and was granted by the crown to those under whom he claims[3]; but, as deeds and instruments are liable to be lost, length of possession, and old deeds, conveying tithes, have been deemed sufficient evidence of title[4]. When the plaintiff sues as farmer of the tithes, he must prove a lease by those under whom he claims[5].

[1] Vide Bul. N. P. 188, &c.

[413]

[2] Ante, 440. See also Monks v. Butler, 1 Roll. Rep. 83, and 3 East, 199.

[3] Vide Comyns's Rep. 651.

[4] Kynaston v. Clark, 5 T. Rep. 265.

[5] Selwyn v. Baldy; and Hardidge v. Gibbs, Bul. N. P. 188.

The plaintiff must then prove the defendant's occupation of lands within the parish, his taking away the tithes, and the value of them; and, if there has been any agreement for a composition, it has been said that he must show such composition to have been discharged by six months regular notice, expiring at the end of the year, in the same manner as in the common case of a tenancy from year to year[6]. A mere conversation and demand of the tithes two years before the action, not followed by any formal notice, has been holden not to be sufficient[7]; but where the inhabitants of a parish had been for a length of time in the habit of paying a certain composition for the vicarial tithes, and at the usual time of settlement the vicar gave a verbal notice to the parishioners, that for the future he should require the tithes to be rendered to him in kind, this was considered as determining the composition, and entitling

[6] Bishop v. Chichester, 2 Bro. Ch. Rep. 161. Sed vide Wyburd v. Tuck. ubi sup.

[7] Fell v. Wilson, 12 East, 83.

titling him to call on the landholders present to set them out[1] (*c*). On this evidence the lands will be presumed to be chargeable, unless the contrary be shown on the part of the defendant, and though they have never paid tithes, that alone will furnish no defence, if the declaration state that tithes were yielded and *payable*[2], within forty years next before the making of the statute; though where the declaration merely stated that they were yielded and *paid*[3] within forty years next before the statute, some evidence of payment was required; and, though a layman cannot prescribe *in non decimando*, yet if the tithes belong to a lay impropriator, and the land in question has been constantly ploughed, and no tithe paid, it may be ground for the jury to presume a grant by him, and severance of the land from the rectory (*d*). In this case, therefore, the *onus* will lie on the defendant to show that it has been constantly before in a state of tillage[4].

[1] Leech *v.* Bailey, 6 Price, 504.

[2] Mitchel *v.* Walker, 5 T. Rep. 260. See also Hallewell *v.* Trappes, 2 Bos. & Pul. N. R. 173.

[3] Lord Mansfield *v.* Clarke, cited 5 T. Rep. 263.

[414]

In cases where the lands are discharged from tithes by a money payment or modus, the evidence will be of the same nature as in all other cases of custom, viz. the constant and uniform payment of

[4] Vide Com. Rep. 648. Rotheram *v.* Fanshaw, 3 Atk. 628. 5 T. Rep. 264, &c.

(*c*) In this case the Chief Baron *Richards* held, that where a modus was set up which failed, the defendant could not insist on notice. In *Bishop* v. *Chichester*, vide supra, Lord *Thurlow* on the authority of *Adams* v. *Hewit*, contrary as it should seem to his own judgment, held otherwise; and there does not, in point of sound sense, appear to be greater reason for it, than in the common case of a tenant who sets up title in himself.

(*d*) In *Mead* v. *Norbury*, 2 Price, 338, the Court of Exchequer held, that a grant of tithes could not be presumed, even as against a lay impropriator, unless some evidence were given of the grant; or enjoyment of the tithes shown by something like actual permanency, or a dealing with the tithes as owner; and that the circumstances of the church having been long dilapidated, and no tithe paid, of a former impropriator having declared that the lands in question were exempt from tithes, and leases from the rector of the impropriate rectory excepting the tithes, were not sufficient to raise the presumption. Sed vide *Lady Dartmouth* v. *Roberts*, 16 East, 334; ante, 26.

the

Part II. *Action for Tithes.*

the sum taken in lieu of tithe. A continued payment of a sum, small enough to be considered as an *immemorial* payment, will, if the origin of it be not shown by the parson, be deemed sufficient evidence of its having been immemorial; and the circumstance of the witnesses calling it a composition, will not lessen the legal effect of such payment[1]. It has been much the practice of late years to produce ancient documents, such as Pope Nicholas's Taxation, the Ecclesiastical Survey, and ministers accounts in the time of Henry the eighth, and the parliamentary surveys in the time of the commonwealth, to invalidate moduses; and in the above case the latter document appears to have been introduced for that purpose, on which the Chief Baron *Richards* is reported to have said, "that the fact of the parliamentary survey, not referring to the moduses, was nothing when opposed to the proof of actual payment. Had that document (his lordship added), though it is certainly entitled to great weight on some questions, even stated that there was no modus, it would not, as being on that subject *res inter alios acta*, be strong enough to overturn the positive evidence of actual payment, still less was the mere omission to mention it sufficient." On other occasions[2] these documents have been considered as by no means conclusive on such a question. But a terrier, signed by the minister and parishioners, is the strongest evidence which can be adduced either to disprove the modus altogether, or to prove the nature of the payment, and define its legal character[3].

[1] Driffield *v.* Orrell, 6 Price, 325.

[2] Jee *v.* Hockley, 4 Price, 87; vide 5 Price, 377.

[3] Drake *v.* Smith, 5 Price, 369. Mytton *v.* Harris, 3 Price, 19.

Where the defendant contends that the lands are wholly exempt from tithes, he must show the ground of discharge; for the mere circumstance of their not having been before charged, is (as observed above) not sufficient, because a layman cannot set up a prescription *de non decimando*, without deducing his title

title from some ecclesiastical person, though he may one, *de modo decimandi*, without any such aid. Ch. XVI. s. 2. *Action for Tithes.*

But though a layman cannot so prescribe, a bishop, or his tenant or copyholder, may show that he and all his predecessors, seised of such a manor in right of the bishoprick, have held the manor by them and their tenants discharged of tithes; and the stat. of 31 Hen. 8, c. 13, having continued the exemption of lands belonging to the monasteries thereby dissolved, in the same manner as those religious houses enjoyed them before their dissolution, any lay person, upon showing that such lands did belong to a religious house dissolved by that statute, or by stat. 32 Hen. 8, c. 24, and that while in their hands they were exempt from tithes, may hold such lands discharged from them in the same manner as they were enjoyed by the monastery. Bishop of Winchester's Case, 2 Co. 44. [415] Vide Hob. 292.

The grounds of discharge, which spiritual persons enjoyed before this statute, were four in number, viz. 1. By the pope's bull of exemption, which may, as was observed before, be proved by the bull itself, or an exemplification of it under the bishop's seal, and proof that the lands in question belonged to those mentioned in it. Ante, 87.

2dly. By prescription, and unless it be proved that the lands have paid tithes, the mere circumstance of their having belonged to a monastery so dissolved, will be *prima facie* evidence that they immemorially held it discharged of tithes. The religious house must be one founded before the time of legal memory (1 Rich. 1.) for if founded within that time, there could be no such prescription. Nash v. Molins, Cro. Eliz. 206. Hob. 300.

3dly. By composition real, which was, when lands, or other real recompense, were assigned to the parson as a compensation for the tithes of the land in question. This must be made with the parson, by consent of the patron and ordinary, and may exist in the case

Part II. *Action for Tithes.*

case of a layman, as well as of an ecclesiastical person. Those made with the ecclesiastical houses, must, of course, be made before the statute of

[416]

13 Eliz. c. 10, by which parsons and vicars are restrained from making any conveyances of the estate of their churches, other than for their lives, or twenty-one years, so that no composition created since that time can be supported against the successor, though confirmed by a decree of the Court of Chancery. To prove a composition with a lay person, however, the instrument itself whereby the composition was made, should be shown, either by its production, or some evidence of its former existence, for no presumption is admitted of it by mere non-payment or reputation [1].

13 Eliz. c. 10.

[1] 2 Wood, 107. Vide Comyns's Rep. 649; and Hob. 297. Chatfield v. Fryer, 1 Price, 253.

4thly. By order, as the templars, cistericans, and hospitallers of Jerusalem; these, however, were exempted only during such time as the lands were in their own occupation and manurance. To entitle lands to this exemption, it is necessary that they should have been in the hands of those orders before the council of Lateran (1179); and if such lands have ever paid tithes it will induce a presumption that they were purchased by them after that time [2]. Another restriction on this exemption is, that the lands are only privileged while in the hands of the person who has an estate of inheritance in them as a tenant in fee or in tail [3], for a mere lessee for life or for years (unless holding immediately under the crown [4]), is chargeable in respect of them during his occupation.

[2] Lord v. Tuck, Bunb. 22.

[3] Wilson v. Redman, Hard. 174.

[4] Owen, 46.

Hob. 298.

But the statute of Hen. 8, has introduced another exemption which did not exist before it, and that is, where there was a unity of possession by the religious house, of the parsonage and the land which is attempted to be charged, provided that such unity existed from time immemorial, and that no tithe was

[417]

paid

paid for it by the abbot or his farmer; for if united within time of memory, or tithe has been paid, it is not discharged by the statute. However, in this case, as in former, if the unity be proved, and the time of the union cannot be ascertained, and there is no evidence of tithes having been paid, the presumption will be in favour of its exemption[1]. This, therefore, is in effect the same as a discharge by prescription, and when put specially on the record may be so pleaded.

Ch. XVI. s. 2. *Action for Tithes.*

[1] Saville, 62. Vide Hob. 299.

It may be proper to observe on these several modes of exemption, that they extend only to such lands as came to the crown by virtue of the statute of 31 & 32 Hen. 8, and not to such as came to it either by 27 Hen. 8, c. 28, which dissolved the lesser abbeys, or by 1 Edw. 6, c. 14[2].

[2] 2 Co. 47. Fosset *v.* Franklin, Sir T. Raym. 225.

The fact of the lands belonging to a monastery, &c. is generally proved by the survey of their lands at or soon after the time of their dissolution, or by some other public document, the evidence and effect of which have been before taken notice of. Most of the documents are to be found either in the Augmentation Office or Chapter House.

Ante, 82.

Another defence, which may be made to actions of this kind, is where barren lands are newly inclosed. These are exempted for seven years, by the before-mentioned statute of Edw. 6, but, to support this defence, it must be proved, that the land is utterly barren and unprofitable. Land which when cleared will immediately yield a crop without any extraordinary degree of manure, though the cultivation is attended with considerable expence, is liable to tithe[3]; and, therefore, a warren or sheep walk which is ploughed, a wood which is grubbed and then sown with corn, land recovered from the sea, or drained, cannot claim this exemption, unless they

Vide Bul. N.P. 191. 1 Ves. 117.

[418]

[3] Jones *v.* Le Davids, Exch. Hil. T. 1791. ex rel. Williams, Ser. Vide Com. Dig. Dismes, (H.) 15.

Part II. *Action for Tithes.*

they are so bad in themselves as to require an extraordinary expence of manure or labour[1] before they will produce any crop.

[1] Warwick *v.* Collins, 2 M. & S. 349. 5 M. & S. 166, S. C. which see.

SECTION III.

In the Action for Dilapidations.

Sect. 3. *Action for Dilapidations.*

In the action for dilapidations of the parsonage-house or buildings, brought against the predecessor of the plaintiff, or his executor, the plaintiff must, in the first place, prove his own title, by the same means as are pointed out in the case of an ejectment for the rectory, or action for not setting out tithes. He must then prove that the defendant or his testator was possessed of the living, and this possession may be proved by the circumstance of his acting as parson, by preaching, taking tithe, &c. Lastly, [419] the plaintiff must prove the state of the buildings at the time of the resignation of the defendant, or death of his testator, and the money which either has been, or necessarily must be expended to put them in a proper state of repair. As to the state of the repairs, at the time when the defendant came into possession, it seems not to be material, if, as has been said, he is answerable for the whole dilapidations, whether arising in his own time or before; but, as this has never been judicially decided, it may, when evidence of that fact can be adduced, be proper to be prepared with it.

Vide 3 Bur. Ecc. Law, 184.

SECTION IV.

In the Action for Non-Residence.

Ch. XVI. s. 4. *Action for Non-residence.*

THE first statute which authorized the temporal courts to take cognizance of, and enforce the residence of the clergy, was the 21 Hen. 8, c. 13, whereby it was enacted, that as well all and every person then being promoted to any archdeaconry, deanery, or dignity in any monastery, or cathedral church, or other church, conventual or collegiate, or being beneficed with any parsonage or vicarage, as all and every spiritual person and persons which thereafter should be promoted to any of the said dignities or benefices, with any parsonage or vicarage, should be resident and abiding in, at, and upon his said dignity, prebend, or benefice, or at one of them at the least; and in case he should not keep residence at one of them, as aforesaid, but absent himself wilfully by the space of one month together, or by the space of two months, to be at several times in any one year, and make his residence and abiding in any other places by such time, he should forfeit, for every such default, 10*l.* half to the king, and half to him that would sue for the same (*e*). [420]

Thus

(*e*) It is provided that this act shall not extend to certain persons excepted out of it, and, amongst others, scholars abiding for study, without fraud or covin, at any university, and chaplains to the king, queen, and other persons named in the act, during the time of their attendance.

The stat. 25 Hen. 8, c. 16, extended the exemption to the chaplains of the judges, and of the attorney and solicitor general, residing in their houses; and the 28 Hen. 8, c. 13, narrowed the exemption of students at the university to such as were under forty years of age, and who were present at the ordinary lecture, &c. saving, however, the privilege of the chancellor, and other officers of the university, though above that age.

The exemptions were again extended by the stat. 33 Hen. 8, c. 28, to one chaplain of the chancellor of the Duchy of Lancaster,

Part II. *Actions for Non-residence.*

Thus stood the law on this subject till very lately, when a great number of actions having been brought by common informers against clergymen for non-residence, some of which were very vexatious and oppressive, the legislature thought proper to suspend such actions from time to time, till the law on this subject should be well considered, and some further provisions introduced; and at length a statute was passed (43 Geo. 3, c. 84,) whereby (s. 12,) so much of the act of 21 Hen. 8, as imposes the penalty of 10*l.* on persons therein described who shall not reside, &c. was repealed, and further provisions enacted. The statute was itself repealed by another act, also made in the late king's reign; and now by statute 57 Geo. 3, c. 99, s. 5, it is enacted, that thenceforth every spiritual person, holding any benefice, who shall, without such licence or exemption as is in this act allowed for that purpose, wilfully absent himself therefrom for any period exceeding the space of three months together, or to be accounted at several times in any one year (*f*); and make his residence and abiding at any other place or

[421]

and of other officers therein mentioned, residing in their houses, and attendant on their persons. But it was provided by the latter statute, that such chaplains should repair twice a year at the least to their benefices, and there abide eight days, at each time, to visit and instruct their cure, on pain of forty shillings, &c.

Most of these exemptions were continued, and some others added, by the stat. of 43 Geo. 3, s. 15, and 57 Geo. 3, s. 10, and the chaplain of the House of Commons added to the number; but the privilege of non-residence at the university is confined to persons under the age of thirty years.

(*f*) On these words, in the stat. of the 48 Geo. 3, the courts of King's Bench and Common Pleas both held, that the legislature intended a year from the time when the action was commenced, (*Hardy* v. *Cathcart*, 2 Taunt. 2; S. C. in error, 2 M. & S. 534;) but by the last stat. (s. 38,) it is enacted, that, for all the purposes of the act, the year shall be deemed to commence on the 1st January, and be reckoned therefrom to 31st December, both inclusive; and that, (s. 39,) for all the purposes of the act, a month shall be deemed a calendar month, except where a month or months is or are to be made up of different periods, in which case thirty days shall be deemed a month.

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places, except at some other benefice, donative, perpetual curacy, or parochial chapelry, of which he may be possessed, shall, when such absence shall exceed such period as aforesaid, and not exceed six months, forfeit and pay one-third of the annual value (deducting therefrom all outgoings, except any stipend paid to any curate), of the benefice, donative, perpetual curacy, or parochial chapelry, from which he shall so absent himself; and, when such absence [422] shall exceed six months, and not exceed eight months, one half of such annual value; and, when such absence shall exceed eight months, two-thirds of such annual value; and, when it shall have been for the whole year, three-fourths of such annual value; the whole of which penalties are given to the informer. But it is provided by sect. 81, that no parsonage that has a vicar endowed, or perpetual curate, and having no cure of souls, shall be deemed or taken to be a benefice within the intent and meaning of the act. It is provided by sect. 6, that where there is no house belonging to the benefice, a residence within the limits of the parish shall be sufficient; and by sect. 7, that when the governors of queen Anne's bounty have purchased, or shall purchase houses not situated within the parish, but so sufficiently contiguous and suitable, as to be convenient for the residence of the clergyman, such houses having been previously approved by the bishop, by writing under his hand and seal, and duly registered, &c. shall be deemed houses of residence.

Sect. 8, provides, that on rectories, having vicarages endowed, the residence of the vicar in the rectory house shall be deemed a legal residence, provided that the vicarage house be kept in proper repair to the satisfaction of the bishop.

Part II. *Actions for Non-residence.*

And by sect. 9, that the bishop may, in every case where there shall not be a house of residence belonging to the benefice, allow and adjudge any fit house within the limits of the benefice, and belonging thereto, or any fit house belonging thereto, not within the limits, but so contiguous as to be sufficiently convenient for the purpose, to be the house of residence thereof; and such allowance and adjudication in writing, &c. shall be registered from time to time, and be deemed the house of residence for the time being.

By sect. 11, it is provided, that it shall be lawful for any person, being dean, during such time as he shall reside on his deanery, or being prebendary or canon, or holding any other dignity in any cathedral or collegiate church, who shall reside any period not exceeding four months altogether within the year upon such dignity, to account such residence as if he had legally resided on some benefice; and that it shall be lawful for any spiritual person, having or holding any prebend, canonry, or dignity, in any cathedral or collegiate church, in which the year, for the purposes of residence, is accounted to commence at any other period than the 1st of January, and who may keep the periods of residence required for two successive years at such cathedral or collegiate church, in whole or in part, between the 1st of January and the 31st December, in any one year, to account such residence, although exceeding four months in the year, as reckoned from the 1st of January to the 31st December, as if he had legally resided on some benefice. And the bishop is further empowered (sect. 12,) to license any longer period of non-residence upon any such benefice of any prebendary, canon, or other person, holding any dignity in any cathedral or collegiate church, in any

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case in which it shall appear to him, from his own knowledge (if such cathedral or collegiate church is locally situate within his own diocese, or if not, by the certificate of the bishop of the diocese in which the cathedral or collegiate church shall be locally situate), to be required for the performance of any duties in any such cathedral or collegiate church; provided that every such spiritual person shall, during such period, reside on such prebend, &c.; and a general proviso is added, (sect. 13,) in favour of any prebendary, &c. appointed before the making the act, while actually resident.

By the 14th sect. a person having a house of residence upon his benefice, and who shall not reside thereon, is required during such period or periods of non-residence, whether the same shall be for the whole or part of any year, to keep such house of residence in good and sufficient repair; and not doing so, and upon monition issued by the bishop, not putting the same in repair according to the requisition of the monition, within the time specified therein, to the satisfaction of the bishop, and to be certified to him upon such survey and report as shall be required by him, is made liable to all penalties for non-residence, notwithstanding any exemption or licence during the period of such house of residence remaining out of repair, and until the same shall have been put into good and sufficient repair, to the satisfaction of the bishop.

The several sections, from the 15th to the 23d, contain various regulations as to licences for non-residence to be granted by bishops, in certain cases, and by them with the sanction and allowance of the archbishops in others; and by the 23d section, every person who shall be non-resident by reason of any residence on another benefice, or of any exemption, to entitle him to obtain which it is not neces-

Part II. *Actions for Non-residence.*

sary to have a licence, shall, within six weeks after the 1st January in every year, notify the same in writing under his hand to the bishop of his diocese.

The statute (sect. 35,) further enacts, that no penalty shall be recovered other than such as may have been incurred during the year ending on the 31st day of December, immediately preceding the commencement of the action. That (sect. 37,) no action shall be commenced till the first of May, after the expiration of that year; and that (sect. 40,) a month's previous notice shall be given to the party, or left at his dwelling-house, containing the cause of action, &c. and name of attorney endorsed. That (sect. 41,) the delivery of such notice shall be proved on the trial; and (sect. 42,) that no evidence shall be received of any cause of action, except such as is contained in the notice.

The 43d sect. permits the defendant to pay into court such sum of money as he shall think fit, subject to such rules as in other actions wherein the defendant is allowed to pay money into court; the 46th sect. enables the defendant to plead a monition by the bishop against him for non-residence, in case such monition has been issued against him before the service of the notice. The 47th sect. enacts, that no penalty shall be levied against the body of the defendant, where it can be recovered by sequestration within three years.

It is unnecessary to say more as to the proof of notice, than to refer to what has already been written on that subject, when speaking of actions against justices of the peace. After that preliminary proof, he may proceed with the rest of his case.

Bevan v. Williams, ante, 24.

We have before seen, that if an action were brought on the stat. of 21 Hen. 8, the plaintiff was not put to farther proof of the defendant being beneficed with the living, from which he had absented himself, than

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acts done by himself as the clergyman of that place, such as receiving tithes, &c. and the same evidence will still, I conceive, be sufficient. The plaintiff must then prove the absence of the defendant during the time charged. If there were a parsonage-house, his residence in any other house within the parish, would, under the former acts, subject him to the penalties of the act, and will still do so, unless he has the bishop's licence for that purpose, according to the directions of the statute; or is within the other provisions contained in it. Lastly, he must prove the value of the living, and as this would frequently be a task of considerable difficulty, the statute (sect. 44,) has provided, that the court in which the action is depending, shall, upon application made for that purpose, require the bishop of the diocese to certify in writing under his hand to the court, and also to the party named in the rule, the reputed annual value of the living, which certificate shall, in all subsequent proceedings in the action, be received as evidence of the annual value, for the purposes of the act, without prejudice, nevertheless, to the admissibility or effect of any such other evidence as may be offered or given respecting the actual value thereof.

Ch. XVI. s. 4. *Actions for Non-residence.*

Canning v. Newman, 2 Brownl. 54.

[424]

The defendant was formerly permitted to show ill health, or other sufficient reason to excuse his absence. But these excuses are all now settled by the positive terms of the act. He cannot, when not exempted, be permitted to show any other cause, without the licence of the bishop; and, if he has obtained such licence, which can only be granted upon evidence laid before the bishop, the licence itself will be sufficient evidence for the defendant in the action, and, if pleaded, will, by the 45th section, entitle him to double costs, in case a verdict be found for him. In cases where the defendant is exempted without the aid of a licence, he must prove his exemption, by

2 Brownl. 55.

Part II. *Action for Non-residence.*

proving his appointment as chaplain, &c. and that he has duly resided according to the several acts; and must also prove the delivery of his notification thereof to the bishop. To show this fact, he should prove the actual delivery of it to the bishop, by having the original brought from the registry; for the provisions contained in the stat. of 48 Geo. 3, s. 25, whereby the defendant, having delivered a duplicate to the registrar of the diocese, and got a copy certified by such registrar, might use such copy as sufficient evidence of his having made such notification, does not appear to have found a place in the last act of parliament.

[425]

CHAP. XVII.

OF THE EVIDENCE IN COPYHOLD CASES.

Ch. XVII. *Ejectment for Copyhold.*

TO maintain an ejectment for a copyhold tenement, the lessor of the plaintiff must produce the rolls of the manor, which show a surrender to him, or those under whom he claims; and, in general, his own admittance is necessary to complete his title[1]. An heir-at-law, however, may make a lease, and maintain the action before admittance; and where a tenant for life has been admitted, upon the surrender granting that estate, his admittance operates as the admittance of the remainder-man, named in the same instrument also, for it is but one estate[2]. So if *A.* and *B.* be in possession by virtue of a grant for their lives, and the lord grants to *C.* for life, from and after the deaths of *A.* and *B.*, *C.* may maintain an ejectment immediately on the death of the survivor, without further admittance[3]. But a devisee cannot maintain any action before admittance[4]; and if such devisee never be admitted, a devise by him is void, and

[1] Rumney *v.* Eves, 1 Leon. 100. Doe dem. Tarrant *v.* Hellier, 3 T. Rep. 162.

[2] Auncelm *v.* Auncelme, Cro. Jac. 31.

[3] Roe dem. Cosh *v.* Loveless, 2 B. & A. 453.

[4] Roe dem. Jefferys *v.* Hicks, 2 Wils. 15.

and the legal estate descends to the heir-at-law of the original testator[1]. So before the stat. 55 Geo. 3, c. 192, (which takes away the necessity of surrenders to the use of wills), if the surrenderee made a surrender out of court to the use of his will, before he had been himself admitted, such surrender was void, and could not be made good by a subsequent admittance[2], and devisees of a mere contingent remainder, not being in the seisin, cannot make any surrender of their interest[3]. In a case, where a mortgagee brought an ejectment and showed a surrender to him before the day of the demise laid in the declaration, and proved his admittance in consequence[4], the court held that he was entitled to recover, though, in fact, the admittance was not made till long afterwards; for, when once made, it related back to the time of the surrender. In this case the court said, that even if there had been no admittance, yet, as against the mortgagor, the ejectment would be maintainable; assigning as a reason, that the mortgagor, being only a trustee for the mortgagee, should not be permitted to set up his legal interest against the claim of his *cestui que trust*; but we have before had occasion to observe[5], that a different doctrine has since been established from that which then prevailed respecting the action of ejectment.

[1] Doe dem. Vernon *v.* Vernon, 7 East, 8.

[2] Doe dem. Tofield *v.* Tofield, 11 East, 246.

[3] Doe dem. *v.* Palmer, 11 East, 185.

[426]

[4] Holdfast dem. Woollam *v.* Clapham, 1 T. Rep. 600.

[5] Ante, 335.

It has been before observed, that the statute of frauds does not extend to wills of copyhold lands. It is sufficient in this case that there is a will in writing, though it is neither signed by the testator, nor attested by any witness; but what shall be deemed sufficient proof of such will does not appear to be very clearly ascertained. It has been said that any written paper, which the ecclesiastical court would hold to be a will, shall be considered as a sufficient declaration of the use to which the estate was subjected by a surrender to the use of a will; and, therefore,

Vide Carey *v.* Askew, 2 Bro. C. Cas. 59. 2 Coxe's P. Wil. 259, note, S. C. Doe dem. Cooke *v.* Danvers, 7 East, 299.

Part II. *Copyhold Cases.*

therefore, it has been usual not only to prove the original paper writing, but also to produce the probate which has been granted of it; and even instructions taken by an attorney for the making of a will, when so proved, have been holden sufficient to pass the estate.

Doe dem. Smith *v.* Smith, Thetford Spr. Assizes, 1805, cor. Mansfield, C. J.

In one case a paper found in the bureau of the testator was produced. This paper was all in the testator's hand-writing, and contained a blank attestation; but it was not signed by the testator, nor had any witness put his name thereto. It was contended that the instrument appearing on the face of it to be an incomplete thing, the Ecclesiastical Court would never grant probate of it; and, therefore, it was not a will; but that even if it were otherwise, as no probate had been granted, it could not be received in evidence, as a will, within the meaning of the surrender. The learned judge who tried the cause rejected the evidence altogether, and as there had been no probate, would not suffer any witness to be examined in support of the paper, but the Court of King's Bench afterwards granted a new trial; and the devisee making no defence thereon, the point was not further discussed. From this decision of the Court of King's Bench, however, it seems to have been the opinion of that Court, that the courts of common law may enter into the question, whether the paper amounts to a will, though no probate has been in fact granted; and, indeed, where the will is merely of the copyhold land and no personalty is bequeathed, the whole must depend on the paper itself, for the ecclesiastical courts never could take cognizance of it. To this we may add, that in the cases before the statute of frauds, wherein it came to be a question what should be a will of lands under the statute of wills, 32 Hen. 8, c. 31, (and which cases seem to be most

Vide Sackvill *v.* Brown, Dyer, 72. Nash *v.* Edmunds, Cro. Eliz. 100.

most applicable to the present point [1]) no argument was drawn from the grant of probate by the ecclesiastical court, but the common law courts themselves decided what was a will, without the aid of their construction. In those cases, as in the present, any disposition of the estate by writing, whether such writing were made by the testator himself, or by any other person by his commandment or consent, was holden to be a will within the meaning of the statute.

[1] Vide 7 East, 324.

But where the testator merely told the witness, that a third person should have his land, and the witness recited the words of the intended will to the testator, and asked him if this should be his will, to which he assented; and the witness afterwards put it into writing, but never showed the writing to the testator, or read it to him, this was determined not to be a good will, as not being made in *writing* by the testator.

Nash v. Edmunds, Cro. Eliz. 100.

When the lord himself claims the estate, as forfeited by reason of a lease made by the defendant, he must prove, that the person who is alleged to have committed the forfeiture, was admitted tenant on the rolls of the manor. It will not be sufficient, in this case, to prove that his father was admitted, and that the land descended to him, and that he has paid quit rents; for, though he might enter to make a lease before admittance, nothing vested in him which he could forfeit before admittance and entry.

Read v. Allen, per Comyns, Oxf. Circ. 1730. Bul. N. P. 107, (a).

Vide etiam, 2 Wilson, 15.

Another case, in which very strict evidence has been required, is, when the lord seizes the land as forfeited for want of the heir coming in to be admitted.

[427]

(a) Mr. *J. Buller* also cites 1 Lord Raym. 726, in the margin; but, as this book does not contain any thing as to this point, I presume that it was established in *Read* v. *Allen*.

mitted. In this case it has been said, that the proclamation should be proved by *viva voce* evidence, and that the entry thereof on the court rolls is not sufficient[1]. It should be observed, however, that this point is not mentioned in another report of the same case[2]; and in a late case[3], where such a claim was set up, no such evidence appears to have been required. It was determined in that case that the lord could not seize *absolutely pro defectu tenentis* without a special custom authorising him so to do; and, therefore, to support a seizure so made, it will be necessary to prove such a custom.

[1] Lord Salisbury's Case, 1 Keb. 287.

[2] 1 Lev. 63.

[3] Doe dem. Tarrant *v.* Hellier, 3 T. Rep. 162.

To prove the custom of a manor, the first evidence to be referred to will be the court rolls, and on the antiquity and uniformity of these will, in a great measure, depend the validity of the custom. If a payment be claimed by the lord, as an ancient and accustomed payment, the books of the steward or bailiff of the manor, whereby he charges himself with monies received, may also be produced[4]; but, unless it appear that such a sum of money has been from time to time paid by the tenants, the mere entry by the stewards is very weak evidence. So where the question was, whether the lord was entitled to the coals under a freehold tenement within the manor, parol evidence was received of a known distinction within the manor, between old and new land, and the general reputation that the right of coals under the latter belonged to the lord[5]. And, indeed, in all cases of custom, as many instances as possible of its having been acted upon should be produced[6], though we have before observed, that where a custom is formally found by the homage, and entered on the rolls, proof of its having been acted upon, is not absolutely necessary[7]. Thus where it is contended, that by the custom of a manor land shall descend

Vide ante, 85.

[4] 12 Vin. 105, pl. 5.

[5] Burnes *v.* Mawson, 1 M. & S. 77.

[6] Vide 4 Leon. 242, and Mr. J. Grose's Observations on that Case, 4 T. Rep. 32.

[7] Ante, 85.

descend to the eldest female heir, general reputation of such custom, and instances of its having so descended, in some instances, are evidence proper to be left to a jury, though the descent contended for in the particular instance is not exactly similar to any of those that are adduced in evidence, as where the estate is claimed by the grandson of an eldest sister, and the instances proved are only of descents to eldest daughters and eldest sisters (*b*) [1]. And in like manner it has been held, that a single instance of a surrender in fee, by a tenant in special tail, of a copyhold estate, is evidence to prove a custom to bar entails by surrender, though the surrenderor has not been dead twenty years, and though one instance be proved of a recovery suffered by tenant in tail to bar the entail [2].

When the lord brings an action for a fine not exceeding two years value of the premises, on the defendant's admission to them, the defendant's admis-

[1] Doe dem. Foster v. Sisson, 12 East, 62. Roe dem. Bennett v. Jeffrey, 2 M. & S. 92.

[2] Roe dem. Bennett v. Jeffery, 2 M. & S. 262. Lord Northwick v. Stanway, 6 East, 56.

(*b*) The case of *Doe* dem. *Goodwin* v. *Spray*, 1 Term Rep. 466, in some measure militates against this, but there the court seem rather to have considered the question as being, whether a custom *that lands should descend to the eldest sister* was proof that they should go to the *eldest niece*; than whether a custom *that they should go to the eldest female heir*, with no instance to support it but the case of sisters, could be received as evidence of a more extensive custom that it should in all cases go to the eldest female heir; and it should seem that where the rolls of the manor declared that "*nulla tenementa sunt partibilia nec inter heredes masculos nec femellas*," there was evidence of such a general custom. It is observable also, that the judgment in that case was founded on what was said by *Coke*, C. J. in *Ratcliffe* v. *Chapman's* Case, 4 Leon. 242, that the court would not give credit to the custom unless it had been put in ure; wherefore it was concluded, that as no instance of the particular case was proved, the custom, if any, had no weight; without considering that, in the case of *Ratcliffe* v. *Chapman*, there was evidence of descents contrary to the supposed custom, a kind of proof which did not exist in the case then before the court; and in the subsequent case, (*Roe* dem. *Beebee* v. *Parker*, 5 T. Rep. 26), when Lord *Kenyon* presided in the court, a custom entered on the rolls was held to be sufficient though no instance of usage was adduced.

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sion, the presentment of the homage as to the value, and proof of the sum required by the action having been demanded of the defendant by letter from the steward, is sufficient, without further proof of the fine having been assessed.

APPENDIX.

APPENDIX.

No. I.

CASES ON THE QUESTION, HOW FAR REPUTATION IS ADMISSIBLE IN QUESTIONS OF PRIVATE RIGHT.

Doe, Lessee of Didsbury & another v. *Thomas & others*, 14 East, 323. (Page 17.)

IN this case, where a testator between fifty and sixty years ago devised lands to his son for life, remainder to his grandson for life, remainder to the heirs of the body of the grandson, remainder to the lessor of the plaintiff in tail; between which latter and the defendant, the devisee in fee of the son, the question was whether the land in dispute, which had been occupied by the son in the lifetime of the testator, was part of the entailed estate, or had been acquired by his own purchase: the court held, that evidence of *reputation that the land had belonged to Sir J. S. and was purchased of him by the first testator*, is not admissible; though coupled with corroborative parol evidence that the land belonged to Sir *J. S.* before the occupation of it by the son, and also by a deed of conveyance of another farm in the same place from the first testator to a younger son about the same period, in which it was recited that the land thereby conveyed had been then lately purchased, *amongst other lands*, by the testator of Sir *J. S.*

Mr. *East* subjoins the following note to the report of that case:—

The admissibility of evidence of this description has been *vexata questio* for many years in *Westminster-Hall*; as the following notes, which I have taken from time to time, will suffice to show.

The following is the same case which is reported in 4 Term Rep. 157, for another point which came on upon demurrer, in Hil. 31 Geo. 3, and where the plaintiff had leave to amend.

Morewood v. *Wood*, M. 32 Geo. 3, B. R.—Trespass for breaking and entering the plaintiff's close called *Swanwick Common*, in the parish of *Alfreton*, in the county of *Derby*, and digging stones therein, and carrying them away, &c. The defendant pleaded, that there are certain wastes or commons lying open to one another, one called *Swanwick Common*, being the close in which, &c. the other called *Swanwick Green*, in *Alfreton*, &c.; and that he was seised in fee of a messuage and lands in *Alfreton*, in right of which he prescribed for the liberty of digging for and carrying away all necessary flags and stones in *Swanwick Common*, and in *Swanwick Green*, for the repair of his houses, fences, &c. The plaintiff replied, that he was lord of the manor of *Alfreton*, and that the defendant of his own wrong committed the trespass. The defendant, in his rejoinder, insisted on his prescriptive right as stated in the plea; on which issue was joined. At the trial before *Hotham*, B. at *Derby* assizes, the defendant called many witnesses, who proved that, for between sixty and seventy years past, he and those from whom he claimed had been in the constant exercise of the right stated in his plea; in many instances to the knowledge of the lord, who had threatened to bring actions, and been dared to do so by the defendant's ancestors, who insisted on their right. On the other hand, the plaintiff produced a presentment in 1717, of the freeholders of the court baron of the manor of *Alfreton*, of which the plaintiff is lord, and which presentment was signed by one *Robert Wood*, the foreman, and others; which name of *Robert Wood* was proved to tally with the subscription (*a*) to the will of *Robert Wood*, the grandfather from whom the defendant claimed, and which will was produced from the registry. One of the items in that presentment was,—"If any person gets stone without leave of the lord of the manor, we pain him 10*s*." The plaintiff also called another witness to prove that, in a conversation with the defendant's uncle, from whom the defendant also claimed, the uncle had admitted that the lord of the manor had the right, and he would not be beholden to him for the stone. The jury found for the defendant. Thus much appeared on the judge's report, on a motion for a new trial. But the plaintiff's counsel stated further, (which was admitted by the other side, and so taken by the court,) that the learned judge had rejected other evidence which they had tendered, and for which alone the new trial was moved for, viz.

1st, Other presentments of a similar nature to the one received in evidence, but to which no subscription could be proved

(*a*) Vide *Roe* v. *Rawlings*, 7 East, 282.

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by any person from whom the defendant claimed: this was offered as evidence of *reputation*.

2d, General *parol* evidence of *reputation*, that none but the lord had a right to dig stone, &c. on the *locus in quo*.

A rule *nisi* having been granted, *Chambre*, *Clarke*, *Sutton*, *Willis*, and *Ascough* contended, in support of their rule, that a general custom or prescription, covering all the estates of the tenants of the manor might clearly be proved by evidence of reputation; and that there was no solid distinction between that case and the case of a particular prescription. There were no title deeds in the one case more than in the other, to which, as to a more certain criterion, reference could be had. In both instances the right rested on memory of particular instances of the exercise of it. In the case of a modus, reputation is evidence; and yet that relates to a particular estate. In the *Bishop of Meath* v. *Lord Belfield*, in 1747, cited in Bull. N. P. 295, it was held that evidence of reputation was admissible in a *quare impedit*, that one *Knight* had been in by the presentation of Lord *R.*; which is a stronger case than this. The case of *Webb* v. *Petts*, Noy, 44, was clearly the case of a modus for a particular farm; and there the court held hearsay evidence to be sufficient. Such evidence as this is also admissible in the case of a manerial custom; and yet the public have as little to do with the custom of a particular manor as with a private prescription. Other persons in the parish may claim the same right as the defendant, and then it might have been laid as a custom, in which case these presentments would have been decisive evidence against it. So that by laying it as a prescriptive right annexed to each farm, instead of a custom, all the lord's proof of his right is gotten rid of; and the tenants may give in evidence those very tortious acts as evidence of a prescription, all which united together could not have supported a custom against the positive written testimony subscribed by all their ancestors who were tenants. Here, they said, there was sufficient to ground the hearsay evidence on.

The counsel on the other side were not heard by the court, who made several observations during the argument, to which the counsel for the plaintiff adapted their answers. On granting the rule *nisi*,

Lord KENYON, C. J. said, he doubted very much if evidence of reputation could be adduced in support of any prescription, unless it affected the public interest in some way or other.

ASHHURST, J. in the course of the argument, said, that if this had been laid as a custom, he conceived that general reputation would have been evidence: but, in the case of a private prescription, he doubted it very much.

BULLER, J. observed, that the practice had been different on different circuits. On the *Oxford* it has been the practice to reject, and on the western circuit to receive this sort of evidence. But upon the latter, I have told the counsel, that I would indeed receive such evidence, if they pressed it, but that, in summing up, I should tell the jury that they were to decide upon the other parts of the case.

Lord KENYON, C. J. (after the argument.) The evidence given by the defendant of an usage of about seventy years is extremely strong in his favour: and the only evidence to weigh against it is that of the presentment signed by *Robert Wood:* but that is not necessarily inconsistent with it. The lord might have the general right, and yet a particular tenement have a prescriptive right also. On that ground, therefore, there is no pretence for impeaching the verdict. With respect to the other question raised, respecting the rejection of general evidence of reputation, it is involved in great dispute; and one is apt to imbibe prejudices from the opinion one has always heard inculcated. Upon the *Oxford* circuit, which I went, such evidence was never received; and I cannot help thinking that that practice is best supported by principle. Evidence of reputation upon general points is receivable, because all mankind being interested therein, it is natural to suppose that they may be conversant with the subjects, and that they should discourse together about them, having all the same means of information. But how can this apply to private titles, either with regard to particular customs or private prescriptions. How is it possible for strangers to know any thing of what concerns only these private titles? I barely, however, throw out these hints as the ground of my present opinion, laying in my claim to change that opinion if I should hear any thing which shakes it.

ASHHURST, J. declared himself of the same opinion: adding, that the utmost which the evidence offered went to prove in the present case was that the lord had the general right; but that did not negative a particular right, provided it was made out in evidence, which it had been in the present instance.

BULLER, J. I have already mentioned what has been the general practice on the *Oxford* and on the western circuit; and as there are two judges from each of those circuits in court (*b*), it is hardly likely for us to agree upon the general point. But thus far I agree with my lord and my brother *Ashhurst*, that in no case ought evidence of reputation to be received, except a foundation be first laid by other evidence of the right. Now here there was no foundation, or at least a very slight one, in comparison to the evidence given by the defendant. But I cannot agree that it ought not to be received at all. It was settled that it ought in the cases cited in argument, and also in many other instances which relate merely to private titles: in one in particular, as to whether such a piece of ground is parcel of one close or another. So again in the case of pedigrees. But as to this particular case, the evidence is very strong with the defendant. It was not proved that the estate in question was in the possession of the defendant's grandfather at the time he signed the presentment which was read in evidence: and even if that were made out, all the evidence since for above sixty years is the other way. The defendant's ancestors have all that time taken stone in defiance of the presentment, and in the face of the lord himself, who was dared to bring any action for it. Now, sup-

(*b*) Lord *Kenyon* and *Ashhurst*, J. had gone the *Oxford*, and *Buller* and *Grose*, J. the western circuit.

posing

posing all the evidence of reputation had been received, I think it ought to have weighed so slightly with the jury, that the court ought not to grant a new trial. For I do not know, that because evidence which ought to have been received was rejected, therefore the court are bound to grant a new trial, if they see clearly that the verdict is right, notwithstanding such evidence had been admitted.

Grose, J. was of the same opinion as *Buller*, J. on the general point, that evidence of reputation is to be admitted. I confess, he said, that habit has so enured my mind to think it admissible in these cases, that I cannot change my opinion without much further consideration: though I certainly should if, upon future thoughts, I should be convinced that the practice of the western, and I believe also of the northern circuit, is wrong. Once, indeed, I remember the case of a pedigree tried at *Winchester*, where there was a strong reputation throughout all the country one way, and a great number of persons were examined to it: but, after all, the whole was overturned, and proved to have no foundation whatever, by the production of a single paper from the Herald's Office: which shows, to be sure, how cautiously this sort of evidence ought to be admitted.

Rule discharged.

In the case of *Outram* v. *Morewood*, Hil. 33 Geo. 3, 5 Term Rep. 123, Lord *Kenyon*, C. J. said, "Although a general right may be proved by traditionary evidence, yet a particular fact cannot." The particular fact there was, whether a certain close, then called the *Cow Close*, had been part of the estate of Sir *John Zouch*, in the 18th of Eliz. out of which certain rents and coals had been reserved: and all the court agreed, that this fact could not be proved by entries made by a third person, deceased, in his book of receipts of rents from his tenant; considering such entries as no more than a declaration of the fact made by such third person; which was different from the entries of a steward, who thereby charges himself with the receipt of the money. And *Grose*, J. distinguished this from the cases where traditionary evidence had been allowed, "because the tradition of a particular fact is not evidence."

In *Nicholls* v. *Parker*, *Exeter* summer assizes 1805, upon a question of boundary between two parishes and manors, whether a certain common was within the parish and manor of *Holne*, of which Sir *Bouchier Wrey*, bart. was lord, or within the parish of *Buckfastleigh* and manor of *Mainbow*, of which Colonel *Parker* was lord: *Le Blanc*, J. admitted evidence of what old persons, now dead, had said concerning the boundaries of the parishes and manors; though not as to particular facts or transactions. And this, though these old persons were parishioners, and claimed rights of common on the wastes, which would be enlarged by their several declarations; there not appearing to be any dispute at the time respecting the right of the old persons making the declarations, at least no litigation pending; (for, in truth, the boundary had been long in dispute between the respective parishes and manors, and intersecting perambulations had been made both before and after such

declarations by the respective parties); so that those persons could not be considered as having it in view to make evidence for themselves at the time. And in support of the same opinion were cited, *The King* v. *The inhabitants of Hammersmith*, sittings at *Westminster* after Hilary term 1776, before Lord *Mansfield*, C. J. (*c*), and a case of *Down* v. *Hole*, at *Taunton*, in 1795, before *Lawrence*, J. in both which the same point had been ruled.

In *Clothier* v. *Chapman*, *Bridgewater* summer assizes 1805, in replevin, the question was whether *Street Hill*, alias *Iveythorne Hill*, a waste, was parcel of *Iveythorne Farm*, and the soil and freehold of one *Rooke*, or not; evidence was offered of declarations of old persons deceased, as to the ancient boundary of the waste belonging to *Iveythorne Farm*, that it extended to the inclosures on the north side of the hill: and 2 Roll. Abr. 186, pl. 5, tit. *Prerogative*, was cited in support of it, where it was held that such declarations, as to whether certain land was parcel of a manor or of an estate, were deemed admissible as between subjects, but not as against the crown: and *Davies* v. *Pierce*, 2 Term Rep. 53, was also cited. But *Graham*, B. rejected the evidence in this case, where the question was not as to the boundary of a parish or manor, but between one person's private property and another. There was a verdict afterwards for the defendant, by whom this evidence had been offered, so that the question could not be stirred again.

No. II.

OF THE EVIDENCE TO SHOW MISCONDUCT OR CONSPIRACY IN THE INSTITUTION OF A PROSECUTION.

The Queen's Case.—House of Lords, October 17, 1821. 2 Brod. & Bing. 302.

THE following questions were proposed to the learned judges:—

"First, If, in the trial of an indictment for a capital offence, or any crime, evidence had been given upon the cross-examination of witnesses examined in chief in support thereof, from which it appeared *A. B.* not examined as a witness, had been employed by the party

party preferring the indictment as an agent to procure and examine evidence and witnesses in support of the indictment, and the party indicted should propose, in the course of defence, to examine *C. D.* as a witness, to prove that *A. B.* had offered a bribe to *E. F.* in order to induce him to give testimony touching the matter in the indictment, (*E. F.* not being a witness examined in support of the indictment, or examined before it was so proposed to examine *C. D.*) would the courts below, according to their usage and practice, allow *C. D.* to be examined for the purpose aforesaid; or could such witness, according to law, be so examined if the counsel employed in support of the prosecution objected to such examination?"

"Secondly, If, in the trial of an indictment for a capital offence, or other crime, evidence had been given upon the cross-examination of witnesses examined in chief in support thereof, from which it appeared that *A. B.* not examined as a witness, had been employed by the party preferring the indictment as an agent to procure and to examine evidence and witnesses in support of the indictment, and the party indicted should propose in the course of his defence to examine *G. H.* as a witness to prove that *A. B.* had offered him a bribe to induce him to bring papers belonging to the party indicted, (*G. H.* not having been examined as a witness in support of the indictment), would the courts below, according to their usage and practice, allow *G. H.* to be examined for the purpose aforesaid; or would such witness, according to law, be so examined if the counsel employed in support of the prosecution objected to such examination?"

The learned judges desired leave to withdraw, which they did, and on their return prayed for further time to consider on these questions, till the

next day: leave was granted accordingly; and a third question was proposed to them, which on the next day was withdrawn, not being sufficiently clear, and the following question proposed in its stead:—

"Supposing, that according to the rules of law, evidence of a conspiracy against a defendant for any indictable offence ought not to be admitted to convict or criminate him, unless as it may apply to himself or to an agent employed by him, may not general evidence, nevertheless, of the existence of the conspiracy charged upon the record, be received in the first instance, though it cannot affect such defendant unless brought home to him, or to an agent employed by him; and whether the same rule would apply if a defendant sought by such general evidence, in the first instance, to affect the prosecutor with a conspiracy to suborn witnesses for the destruction of his defence?"

Oct. 18th. On this day, *Abbott*, C. J. delivered the following answer to the house.

"My lords, the judges conferred together for some time yesterday, upon the questions proposed to them by your lordships, and afterwards separated in order to consider them apart, and met again early this morning, and again conferred together upon them. All of us then agreed upon the answers to be given to the questions proposed to us; and I, having read to my learned brothers the writing, which I had prepared, as containing my own sentiments and answer, it was found that they concurred therein; and I have their authority, with your lordship's permission, to deliver what I have written, (which your lordships will observe is in the singular number, being originally prepared as my own alone), as containing and expressing their sentiments also.

"My lords, the first question proposed by your lordships

lordships is in these words, [*here his lordship repeated the first question*]. My lords, the question thus proposed by your lordships to the judges, must be admitted by all persons to be a question of great importance, as it regards the administration of justice; and it is to me a question entirely new, and of very difficult solution. I have considered it with all the attention due to a question proposed by your lordships, and with an anxiety proportioned to the question itself; and it is not without much diffidence that I now offer to your lordships the result of my deliberation. Your lordships will allow me here to interpose an observation, and to say, that the diffidence I felt at the moment of writing, has been considerably decreased by the knowledge I now have, that my opinion and sentiments have conceived the concurrence of my learned brothers.

" The question must, as it appears to me, be considered in the same mode, and must receive the same answer, as if the parties were reversed: as if, instead of proof offered on the part of the defendant respecting the conduct of an agent employed by the prosecutor, it were proof offered in reply on the part of the prosecutor respecting the conduct of an agent employed by the accused to procure and examine evidence and witnesses in support of his defence. If such proof can be received on the part of a defendant, it must be received on the ground that it may lead to a legitimate inference and conclusion, that the witnesses examined against him, though not appearing to have been called before the court by any undue means, are nevertheless, on this ground extraneous and foreign to them, not to be considered as the witnesses of truth. And, if such an inference and conclusion can be reasonably and legitimately drawn in favour of a defendant, in the case proposed by your lordships, I am unable to discover any principle upon

upon which I may say, that the like conclusion may not be with equal reason drawn against him in the analogous case that I have taken the liberty to suggest; so that proof of this nature, if admissible, must be expected to lead as frequently to the condemnation of an innocent man, by casting discredit to his defence, as to the acquittal of such a person by disgracing the prosecution: and this consideration enables me to contemplate the question proposed with more calmness than I should be able to view a question of which the determination might possibly, by the exclusion of his evidence, lead to the condemnation of an innocent person; but could in no case produce the same consequence by the exclusion of evidence against him.

"The question proposed by your lordships regards the act of 'a person employed by the party preferring an indictment as an agent to procure and examine evidence and witnesses in support of the indictment;' and it regards the act of that agent addressed to a person not examined as a witness in support of the indictment; and leaving, therefore, those witnesses unaffected by the proposed proof otherwise than by way of inference and conclusion, and this question may be considered as it regards the prosecutor or party preferring the indictment, and as it regards the witnesses.

"The prosecutor has, by the hypothesis, employed a person as an agent to procure and examine evidence and witnesses. This is a lawful employment, necessary in many cases, in some meritorious, in none disgraceful or improper, if we look either to the employer, or to the person employed; and being a lawful employment, it is to be presumed, until the contrary be shown, that the employer means and intends that his agent should execute it by lawful means; and as, according to the general rules and principles

ciples of law, a person is not to be affected in interest or fame by any act of another, although that other may have been in his employment or confidence as an agent or otherwise, (excepting such acts only as either are in their own nature, or may by extrinsic evidence be shown to be within the scope of the authority given by him, and which may, therefore, be considered as his acts, performed by the hand, or as his declarations, uttered by the tongue of his appointed substitute), it would be contrary to those general rules and principles to allow a prosecutor, and, through him, the prosecution that he has instituted, to be disgraced by the act supposed in your lordships question, without some further proof affecting him than the terms of that question suggest. It is perfectly consistent with the matters of fact contained in your lordships question, that the prosecutor may, up to the very moment when the proof is offered, be wholly ignorant of the wicked act of his agent; it is no less consistent, that, having been informed of the act, he may have rejected it with indignation ,and have repudiated the proffered testimony, and withholden the witness from the court; and, if he be absent from the trial, which frequently happens, it may be impossible to prove his ignorance in the one case, or the propriety of his conduct in the other.

" With regard to the witnesses, my lords, which is the most important part of this consideration, (because if false witnesses are produced against a person, it is of little consequence to him by what procurement they may have been produced), it is to be considered, whether a legitimate inference and conclusion can be drawn against their credit and veracity from the proof proposed. The proposed proof does not directly affect them; it regards an act, to which, according to the hypothesis, they may be entire strangers; and, being an unlawful act, they are not

to

to be presumed to have been parties to it, or to any other act of the like nature, without proof against them; they may be persons of honour and probity deposing to facts really and truly occurring within their own personal knowledge, and taking place within their own sight and hearing, as they have averred upon their oath. It may have been intended that the person, to whom the bribe was offered, should speak to other facts occurring at another time and in another place wholly unconnected with them, or with the matters to which they have deposed: can it then be reasonably concluded, that the facts deposed by them are untrue? That, however numerous or respectable they may be, they must be all wicked and perjured men, because some other man has, from overweening zeal or a corrupt heart, wickedly endeavoured to seduce by money another person to give evidence touching the matter of that indictment on which they have appeared? I must say, my lords, that I am of opinion, that such a conclusion cannot reasonably be drawn, either in the case proposed in your lordships question, or in the analogous case which I have taken the liberty to adduce. The utmost effect, in my opinion, of the proposed proof, (and, in many cases, even this would not be a fair or reasonable effect), would be to excite suspicion; but suspicion is not a legitimate ground for the verdict of a jury, which ought only to be founded upon reasonable and probable proof; for these reasons, I think your lordships' first question must be answered in the negative.

"This, my lords, is the opinion, which, after much consideration, I have formed upon the question proposed by the house. The question is couched in the most general and abstract terms, and your lordships must be aware of the difficulty that may often occur in forming an opinion upon a question of such a nature, applied

applied not to a matter of abstract science, but with a matter connected with the business and affairs of men. Few cases occur in the practical administration of justice, wherein a judge does not find some help towards a right decision in a questionable point, in antecedent or accompanying facts and circumstances appearing before him, and is not guided in his application of general principles to the individual case by the particulars of that case itself. The question, as proposed by your lordships, does not contain any such aid or guide; I mention not this, my lords, by way of complaint against the question, but by way of excuse for the imperfection of my answer to it; and I must beg leave to add, that notwithstanding the opinion I have delivered on the question proposed, I am by no means prepared to say, that in no case and under no circumstances appearing at a trial, it may not be fit and proper for a judge to allow proof of this nature to be submitted to the consideration of a jury, and the inclination of every judge is to admit, rather than to exclude, the offered proof.

"Secondly, The same reasons which have induced me to answer your lordships' first question in the negative, lead me to answer the second question also in the negative. The question is in these words: [*The Lord Chief Justice here read the second question*].

"In answer to this question, my lords, I must also take leave to add, as another ground of objection to the proof proposed in the question, that it does not thereby appear what was the nature of the papers alluded to, or what the motive of the party endeavouring to obtain them: for any thing that can be inferred from that question, the papers might be unconnected with the subject of the prosecution, and relate wholly to some other and different matter."

Then

Then *Abbott*, C. J. delivered the unanimous opinion of the learned judges to the first part of the third question in the affirmative, also with a qualification; and gave their reasons as follow:—

"My lords, we understand the first part of this third question to relate to a prosecution for some crime, the proof whereof is to consist wholly or in part of evidence of a conspiracy entered into by the party then indicted and under trial; so that the conspiracy is to be given in evidence against him; and the latter part of the question regards the case of a person indicted for some crime, and seeking to defend himself against that indictment by proving a conspiracy to suborn witnesses against him; and the points of inquiry, in both parts, regard only the order and course of adducing the proof before the court; and so understanding the question, we have no hesitation as to answering the first part of it in the affirmative. We are of opinion, that on a prosecution for a crime to be proved by conspiracy, general evidence of an existing conspiracy may, in the first instance, be received as a preliminary step to that more particular evidence, by which it is to be shown that the individual defendants were guilty participators in such conspiracy. This is often necessary to render the particular evidence intelligible, and to show the true meaning and character of the acts of the individual defendants, and on that account, we presume, is permitted. But, it is to be observed, that, in such cases, the general nature of the whole evidence intended to be adduced is previously opened to the court, whereby the judge is able to form an opinion as to the probability of affecting the individual defendants by particular proof applicable to them, and connecting them with the general evidence of the alleged conspiracy; and if, upon such opening, it should appear manifest that no particular proof

proof sufficient to affect the defendant is intended to be adduced, it would become the duty of the judge to stop the case *in limine*, and not to allow the general evidence to be received, which, even if attended with no other bad effect, such as exerting an unreasonable prejudice, would certainly be a useless waste of time.

"As to the second part of the question, my lords, we understand it to be here assumed, that the supposed conspiracy to suborn witnesses against the accused is a legitimate ground of defence, and that your lordships do not ask the opinion of the judges on that point; and, therefore, upon that point we do not presume to offer any thing to your lordships; and, considering this latter part of the proposed question, like the first part, to regard only the order and course of adducing the proof, we shall give the same answer in the affirmative, with this qualification only, namely, that the proposed evidence should, in some way, be previously opened to the court, as in the case of a prosecution to be proved by conspiracy, in order to enable the judge to form an opinion as to the probability of bringing the evidence home, so as to affect some person whose acts are material and relevant to the issue in the indictment then under trial."

No. III.

OBSERVATIONS, CONTAINED IN THE FORMER EDITIONS, ON THE QUESTION—WHETHER WITNESSES CAN BE DISGRACED BY THEIR OWN EXAMINATIONS.

THOSE who contend for such a mode of examination, assert that if it is not to prevail to the fullest extent, the whole benefit of *viva voce* evidence, and trial by jury, will be lost and at an end: That the office of a jury is not to find facts merely because they are sworn to by witnesses, but to weigh and estimate the credit which is due to persons standing in that situation: That, to enable them to do this, it is necessary for them to know something about the life and character of the person testifying; and that such was the ancient policy of the law, appears from the circumstance of the jury being always summoned *de vicineto*, from the neighbourhood of the place where the cause of action arose: "Living in the neighbourhood, they were properly the very country or *pais* to which both parties had appealed, and were supposed to know beforehand the character of the parties and their witnesses, and therefore the better knew what credit to give to the facts alleged in evidence (*a*)." Whereas now, the jury being summoned from the county at large, the witnesses are, in general, entirely unknown to them, and the party against whom they appear, having no notice of the witnesses who are to be called against him, has no other mode of enabling the jury to determine what credit is due to them,

3 Blac. Com. 359.

(*a*) See also *Fortescue de Laud*, c. 26, where the same reason is given for the jury coming *de vicineto*;-and Co. Lit. 158, b.

than

than by an inquiry of themselves, who they are, and how they have passed their lives. That no injury either to the witness or the cause of justice can result from this inquiry, for no honest man will refuse to give an account of himself; and if insinuations, which are unfounded, are thrown out, he has the opportunity of denying the truth of them; which denial, if made in the unequivocal and decided manner which conscious innocence will always dictate, will, instead of prejudicing the character of the witness, throw all the odium, intended to be cast on him by the charge, on the person who had the wickedness to suggest it. Whereas, if it be true, that the witness is of a cast and character which does not entitle him to full credit, he ought not to pass as a man of unblemished reputation.

On the other hand it is said, that a person who comes into a court of justice, to testify in a particular cause, is not supposed to be prepared to answer for all the transactions of his life; that one slight deviation from the path of virtue ought not so to blast the character of a man, as to be for ever the subject of reproach to him; and that when he comes into court, not as a volunteer, but under the compulsory process of the law, he ought not to be placed in such a situation as to be obliged either to confess, and revive the memory of a disgrace which had long since been forgotten, and which his subsequent good conduct had wiped away; or else to be tempted to commit perjury for the protection of that character which his amended course of life had procured him. That if he is wholly incompetent, by reason of the commission of a crime of which he has been legally convicted, the record of his conviction, which contains the particulars of his infamy, is the only evidence to repel his testimony. That if he is not worthy of credit, on account of his general bad character, the law has,

in that case also, pointed out the means of counteracting the effect of his evidence by the testimony of others as to that character. That even in this case particular circumstances are not to be inquired into, much less ought he himself to be questioned as to those facts which others cannot be permitted to prove. That though in some instances the party may be surprised by finding a witness in the box, of whom he has no previous knowledge, yet this so rarely happens, that it is infinitely less mischievous to submit to the inconvenience which a person so circumstanced might experience, than to establish, in every case, a course of practice so highly injurious to the feelings of every man appearing as a witness. But that even here, the party is not without remedy: if he makes it appear to the satisfaction of the court, that he was surprised by the appearance of a stranger; that such stranger is a man of infamous character, or that the evidence which he has given is untrue, and can be contradicted by other witnesses; the court, exercising a sound and equitable discretion, may send the cause back to be reconsidered by another jury.

Unfortunately, no direct authorities are to be found either one way or other. Loose *dicta*, or equivocal expressions, are all that occur to direct our judgment; and though there are some cases which seem to bear a strong analogy, yet it must be recollected that the argument thence arising is counteracted by what is admitted to have been the established and invariable practice for a considerable space of time.

Co. Lit. 158, b. Lord *Coke*, speaking of challenges to jurors, says, "If the cause of challenge touch the *dishonour* or *discredit* of a juror, he shall not be examined upon his oath; but, in other cases, he shall be examined upon his oath to inform the triers." As far as the case of a juryman is analogous to that of a witness, this

this is certainly an authority in favour of those who maintain that such an examination is illegal; but it must be observed, that the same necessity does not exist in the case of a juror as does in that of a witness. The pannel is made out and known to the parties long before the trial; they have an opportunity of inquiring as to the characters and course of life of the persons named in it; and, if they find any thing which destroys the *competency* of a juror, they may be prepared to prove it. His *character*, in respect of matters which would not exclude him from sitting in judgment on a cause, and which forms so essential an inquiry when estimating the *credit* due to a witness, can never be the subject of inquiry; nor is it at all necessary for the purposes of justice that any such inquiry should take place; for if either party dislikes him, he may object to him without assigning any reason whatever; and may extend this peremptory challenge to such a number of jurors as is sufficient to remove the fears of the most cautious and timid. The case of a juror, therefore, differs materially from that of a witness, and as far as the credit due to the latter forms any part of the consideration of the jury, bears no analogy whatever.

But the case which has been principally relied on, on some late occasions, is that of *Peter Cooke*, who being indicted for treason, in order to found a challenge for cause, asked a juryman, whether he had not said he believed him guilty; when the whole court determined, that the juryman was not obliged to answer the question. Cooke's Case, 4 St. Tr. 748. Salk. 153. S C.

Lord C. J. *Treby* said, "You may ask upon the *voire dire*, whether he have an interest in the cause; nor shall we deny you liberty to ask, whether he be fitly qualified, according to law, by having a freehold of sufficient value; but that you may ask a juror, or *witness*, every question that will not make him

criminous that's too large. Men have been asked, whether they have been convicted, and pardoned for felony, or whether they have been whipped for petty larceny, but they have not been obliged to answer; for, though their answer in the affirmative will not make them criminal, nor subject to punishment, yet they are matters of infamy; and if it be an infamous thing that's enough to preserve a man from being bound to answer. A pardoned man is not guilty; his crime is purged; but merely for the reproach of it, it shall not be put upon him to answer a question whereon he will be forced to forswear or disgrace him. So persons have been excused from answering, whether they have been committed to Bridewell as pilferers or vagrants, or to Newgate for clipping or coining, &c. Yet to be suspected is only a misfortune and shame, no crime. The like has been observed in other cases of odious and infamous matters, which are not crimes indictable."

Mr. J. *Powell* clearly considered this as tending to charge the juror with a crime, for after saying it might have been asked in a civil cause, because he might have been a referee, he added, "But, if you make it criminal, it cannot be asked, because a man is not bound to accuse himself." Mr. Baron *Powis* adopted the same line of argument as the chief justice, saying, that though it did not make him infamous in the eye of the law, "yet that it was a shameful thing for a man to give his judgment before he had heard the evidence, and therefore that the prisoner ought not to ask him, to make him accuse himself, if it be opprobrious matter upon him." But it is observable, that he said nothing in respect of such questions being put to a *witness*.

As a decision, therefore, this case extends no further than what was before said by Lord *Coke*. The application of the doctrine to witnesses depends entirely

entirely upon the *dictum* of Lord Ch. Just. *Treby*, who mentions no particular instance in which it had been so applied. It is, nevertheless, the *opinion* of a great judge, and as such not to be lightly or irreverently treated.

The last authority which I find in the books, is what is said by Lord *Hardwicke*, presiding as Lord High Steward, on the trial of Lord *Lovat*, where Lord *Talbot* proposing to ask a question of one of the witnesses before he was sworn, Lord *Hardwicke* said: "The ordinary method of proceeding in these cases is, that when a witness is produced, he is to be sworn in chief, unless there be some objection to his competency; and then he is to be sworn upon a *voire dire*. After he is sworn in chief, the party who produces him asks him such questions as he thinks proper. After which the other party is at liberty to cross-examine him, either to the matter of fact concerning which he has been examined, *or any other matter whatsoever, to impeach his credit or weaken his testimony*; provided the questions that are asked are such as the law allows." Lord Lovat's Case, 9 St. Tr. 670.

It is observable, that Lord *Hardwicke* makes no distinction as to the nature of the incompetency which may be inquired into on the *voire dire*: but the qualification which is added by him as to questions on the examination in chief, has thrown a degree of obscurity on what would otherwise have been very clear. It should seem, however, that his lordship could only have in contemplation, when he made that qualification, an examination as to *crimes* for which the witness would be punishable; for he expressly extends the power of cross-examination to matters concerning which he had been examined, or any other matter *whatsoever which should tend to impeach his credit*. He does not confine it to the explanation of what he had before sworn, or to the introduction of new matter as evidence in the cause;

but he permits the party to inquire of the witness himself into matters foreign to the cause, merely for the purpose of *impeaching his credit*, or, in other words, of *disgracing him*. On the other hand, what is said by Lord Ch. Just. *Treby* is decisive against such a mode of examination; and when we see that great authority on the one hand, and the uniform practice of the bar for a series of years countenanced, as it seems to be, by the opinion of Lord *Hardwicke* on the other, we cannot but consider this as a doubtful point; and one which it is highly important should be judicially and solemnly decided.

CASES SINCE DETERMINED AND REFERRED TO IN PAGE 135.

Harris v. *Tippet*, 2 Campb. 637.—*Gloucester Lent Assizes*, 51 *Geo.* 3.

THIS was an action for not accounting for a promissory note given to the defendant to be discounted on behalf of the plaintiff.

A witness for the defendant was asked, in cross-examination, whether he had not attempted to dissuade a witness, examined for the plaintiff, from attending the trial, he swore positively that he had not.

DAUNCEY then proposed to call back the other to contradict him.

LAWRENCE, J.—That cannot be done. You must take his answer.

DAUNCEY contended, that for the purpose of discrediting the witness, it was competent to show that he had sworn falsely in this instance, and actually had attempted to dissuade the other from attending the trial.

LAWRENCE, J.—Had this been a matter in issue, I would have allowed you to call witnesses to contradict

tradict what the last witness has sworn; but it is entirely collateral, and you must take his answer. I will permit questions to be put to a witness as to any improper conduct he may have been guilty of, for the purpose of trying his credit; but when these questions are irrelevant to the issue on the record, you cannot call other witnesses to contradict the answers he gives. No witness can be prepared to support his character as to particular facts, and such collateral inquiries would lead to endless confusion.

Dauncey and *Ludlow* for the plaintiff.

Jervis and *Abbott* for the defendant.

Weeks v. *Sparke*, 1 Maule & Selwyn, 679.

Trespass for breaking and entering plaintiff's close, parcel of a common; defendant justified for a prescriptive right of common at all times, &c. Replication prescribed to use the place for tillage; and to support such prescriptive qualification of the general right claimed by the defendant, the plaintiffs offered evidence of reputation. The judge received the evidence, and afterwards the court held it was properly admitted, because although the right claimed by the plaintiff was by prescription, yet it was an abridgment of the general right of common over the waste, and affected a large number of occupiers within the district.

Yewin's Case, 2 Campb. 638.

Lawrence, J. laid down the same rule several times during the circuit; and it seems particularly illustrated by the following case, which occurred at *Monmouth*:—One *Yewin* was indicted for stealing wheat. The principal witness against him was a boy of the name of *Thomas*, his apprentice. *Lawrence*, J. allowed the prisoner's counsel to ask *Thomas*, in cross-

examination, whether he had not been charged with robbing his master, and whether he had not afterwards said he would be revenged on him, and would fix him in *Monmouth* gaol?—He denied both.

The prisoner's counsel then proposed to prove, that he had been charged with robbing his master, and had spoken the words imputed to him. *Lawrence*, J. ruled that his answer must be taken as to the former, but that as the words were material to the guilt or innocence of the prisoner, evidence might be adduced that they were spoken by the witness.

No. IV.

MS. CASES CITED, THE NOTES WHEREOF ARE NOT CONTAINED IN THE BODY OF THE WORK.

The King v. *The Inhabitants of Hammersmith*. K. B. *Sittings at Westminster after Hil. Term*, 1776. (p. 15).

ON a presentment for not repairing a road in the hamlet of *Hammersmith*,

Joseph Fitch, a witness for defendants, proved what an old man now dead had told him twenty years ago, about the boundaries of the parish of *Acton* and hamlet of *Hammersmith*; but the old man who told him was at that time an inhabitant of the hamlet: on which Mr. *Bearcroft* objected that this was not evidence, because the person who said it was interested at the time. But

Lord MANSFIELD said it was good evidence, for at that time there was no question or dispute about the matter, and it could not be supposed a man held a conversation for the chance of a dispute in order to make it evidence twenty years afterwards.

Washington and others, Executors, v. *Brymer, K. B. Sittings at Guildhall after Hil. Term.* 42 *Geo.* 3. (p. 29.)

DEBT on bond, dated 27th Sept. 1766, for 800*l.* conditioned for payment of 400*l.* and interest on the 27th Sept. 1767.

Pleas *non est factum, solvit ad diem, solvit post diem, —a Release,*—and a discharge under an insolvent act on 28th May 1778.

To rebut the presumption of payment, the plaintiffs produced an affidavit made by the defendant on the 1st July 1800, before a Master in Chancery, to whom it had been referred to take an account of the testator's personal estate; wherein he stated that the testator, *Michael Foster*, having three daughters, to each of whom he said he intended to give a portion of 1,000*l.*; the defendant in the year 1764 married one of them, and received a portion of 500*l.*; with an assurance that he intended to give him 500*l.* more at his death. That he (the defendant) being in want of money in 1767, applied to the testator to assist him, who then lent him 400*l.* on the bond in question, and being about six years afterwards again in distressed circumstances, he again applied to the testator to assist him; who refused, saying that *he had already had his share of his estate, that he might do as he pleased with what he had, as he should never call on him for it.* The affidavit then added, that the deponent conceived that the testator had cancelled the bond, and that he had never been applied to for payment by him.

The testator died in 1791.

ERSKINE, for the defendant, contended, That though this affidavit rebutted the plea of payment, it afforded strong evidence to presume a release by the testator. When a man promises to forgive his debtor, it must be

be presumed that he intends to do so by those means which the law points out, and as that could only be by a release under seal, it must be presumed that such release had been duly executed. The relationship of the parties to each other gives the strongest reason to presume that it was done; for the defendant relying on the promise of his father-in-law, could not be supposed to call on him to know whether he had executed a release or cancelled the bond as a stranger would; and the circumstance of the testator never having called upon the defendant for the money for twenty-three years together, was the strongest evidence in the world to show that he did not consider this as a subsisting instrument.

GROSE, J. This bond was given by a son-in-law to his father-in-law, and it appears that he afterwards was told that payment would never be called for. He therefore had every reason to suppose that it was either cancelled or otherwise legally discharged. It is clear by the production that it was not cancelled; then a release might have been executed.

Verdict for defendant.

Attorney General and ———, for plaintiff.
Erskine and *Lawes*, for defendant.

Doe dem. Powell v. *Harcourt, K. B. Sittings at Westminster after Easter Term*, 39 *Geo.* 3. (p. 82.)

EJECTMENT for a piece of land situate in the parishes of *St. Leonard, Shoreditch*, and *St. Luke, Old street*, in the county of *Middlesex*.

The lessor of the plaintiff claimed this land under the will of her late husband, Mr. *Moffat*, who derived title from a family of the name of *Radcliffe*. Their title commenced by deeds of lease and release, dated 1st and 2d Feb. 1696, between *James Richard-*

son

son and *John Radcliffe*, whereby a certain piece of land called the *Irish Acre* was conveyed to *Radcliffe* in fee, which land was described as abutting on a piece of land called the *Harpe*. The plaintiff also proved receipt of rent by *Moffat*, her late husband, an old plan delivered by the defendant to the governors of *St. Bartholomew's Hospital*, in which the *locus in quo* was described as part of *Moffat's* estate; and that, unless this land was the plaintiff's, she had no land abutting on the *Harpe*; and that the prebendary of the moor of *St. Paul's*, as lessee of whom the defendant claimed, had without it eighteen acres two roods. She then produced in evidence a survey taken in 1649, by virtue of an ordinance of the parliament, which was entitled as follows:—

"A surveye of certaine parcells of meadowe and pasture grounde in the countye of *Middlesex*, late belonginge to the prebendary of the moore with the cathedrall church of *St. Paul's*, *London*, made and taken by us whose names are hereunto subscribed, in the month of October 1649, by virtue of a commission to us granted, grounded upon an act of the Commons of *England* assembled in parliament, for the abolishinge of deans, and deans and chapters, canons, prebends, and other offices and tythes of and belonging to any cathedral, or collegiate church, or chapel, in *England* and *Wales* (*a*), under the hands and seals of five or more of the trustees in the said act named and appoynted.

"All those eighteen acres of lands, &c." The lands were then particularly specified, and all together amounted to the exact number of eighteen acres.

The defendants attempted to account for the possession of the *Radcliffe* and *Moffat* families, by

(*a*) See this act in *Scobell's* collection, 2d part, page 16.

showing

showing that for many years they held the church lands in lease; and contended, that they being also possessed of other estates of their own adjoining and intermixed, encroachments had been made by them upon the prebendal estate; and that, in point of fact, this was not part of their freehold estate, but part of the land of the prebendary of the moor.

Lord KENYON.—The defendant cannot contradict the parliamentary survey, it has always been considered as conclusive. By the deeds of 1696, this property is described to be in the same posture as that in which it now remains, viz. as abutting upon the *Harpe*; and it appears that if this is not the land in question, the lessor of the plaintiff will have no land so abutting. The parliamentary survey, taken by those who were in possession of the church property, describes it with the utmost particularity; and the quantity of which the prebendary of the moor is now possessed agrees with this description. This is a very strong argument in favour of the lessor of the plaintiff; for the persons who then held the reins of government, and seized the church lands, wished to make the most of them, and would not have described them as of less extent than they really were.

Verdict for plaintiff.

Gibbs, Wood, and *Peake,* for plaintiff.
Erskine, Garrow, and *Best,* for defendant.

Cooke and another v. *Lloyd. Salop Sum. Ass.* 1803, *cor. Le Blanc, J.* (p. 85.)

THIS was an issue directed out of the Court of Chancery to try whether *Joseph Phillips* was the eldest son of *John Phillips* and *Mary* his wife, lawfully begotten. The issue was directed in consequence of a bill filed by the plaintiffs, who claimed under

under *Joseph Phillips* against the defendant, whose father had purchased from *Philip Phillips*, an elder son, but who, it was contended by the plaintiffs, was born before the marriage of his parents.

The single point in the cause therefore was, when *John Phillips* and *Mary Phillips* were first married.

On the part of the plaintiff they called a great number of witnesses who spoke to declarations of the parents that they never were married till 1759; that the father when in anger called his wife a whore, and his children born before that marriage bastards; and that on his death-bed he pointed to *Joseph Phillips* as his heir, and the person to whom his estate (which was settled) would descend after his death; they proved from the register of the parish where they lived the entry of their marriage on the 16th April 1759, previous to which *Philip* and several other children had been born. They also called the mother herself, who positively swore, that though she went to town for the purpose of being married in the Fleet, yet that infact she never was married there nor any where else before 1759.

They also offered evidence of the declarations of *Philip Phillips*, who was dead, (made after he had conveyed to the defendant's father), that he was a bastard; that all the world knew he was such; and that that was the reason of his selling the land so cheap to *Lloyd*, who might fight it out with his brother *Joseph*.

The defendant's counsel objected to this evidence, contending that nothing said by *Philip*, after he had conveyed to *Lloyd*, could be received in evidence to prejudice his rights.

Le Blanc, J. said, that a declaration made under such circumstances was entitled to very little credit, and would avail nothing of itself, but that he thought it admissible as the representation of one of the family of the degree of relationship he bore to it.

This

This evidence was therefore received.

The defendant proved that the mother, whose name was *Mary Guess*, living in the service of *John Phillips*'s mother, banns were published in the year 1747; that those banns being forbidden by his mother, he and *Mary Guess* went to *London* together for the purpose (as they said) of being married in the Fleet; that, on their return, they gave out that they had been so married; that they afterwards lived on the estate, and were visited as man and wife by the neighbours, and at last by his mother herself. That on June 7, 1772, *John Phillips*, by an instrument under his hand, reciting that he had suffered a recovery of the estate, and being only tenant for life, had thereby committed a forfeiture, attorned tenant of the premises to *Philip* as his eldest son. That afterwards another recovery was suffered, to which *John*, as tenant for life, *Mary* as his wife, and *Philip* as his eldest son, and the remainder-man in tail, were parties. That on a motion in the Court of Common Pleas respecting this recovery, *John Phillips* and *Mary*, who to-day had sworn that she never was married, had made an affidavit wherein they swore that they had been married in the Fleet by one *Dare*, in the year 1747; and that the marriage in 1759 was only from greater caution to secure the wife after his death. To corroborate all this they offered the Fleet books, wherein this marriage was entered as having taken place on 28th May 1747, and on *Le Blanc*, J. saying they were no evidence whatever, they called a witness who said that there being a question in the year 1761 as to this marriage, he examined these books then in the possession of a man who said he was clerk to Mr. *Dare*, and that the entry then stood in the books in the same state as it was now.

Le Blanc, J.—This evidence carries the case no further, the witness had no knowledge of the fact, but such as he derived from the books, which were

no

no more evidence then than they are now; the entry is nothing more than a private memorandum made by somebody who had no authority to make it, and who might put down any thing he pleased, whether true or false.

The jury found for the defendant.

Williams, Serj. *Clifford*, and *Abbott*, for plaintiffs.
Dauncey, *Wigley*, and *Wynne*, for defendant.

Leeds v. *Cooke and Wife*. *K. B. Sittings at Guildhall, after Hil. Term*, 43 *Geo.* 3. (p. 95.)

ASSUMPSIT on breach of promise of marriage by the wife while sole. The defence set up was the improper conduct of the plaintiff; and, amongst other evidence, a Miss *Turpin* was called to prove that the plaintiff had, within three or four days after the elopement of Mrs. *Cooke* from her father's house, and before it was known whether she had married or not, written a letter to the witness containing an offer of marriage.

The witness had been served with a *subpœna duces tecum* to bring the letter, and on being called said, that after that writ had been served on her, she had delivered the letter to the plaintiff. No notice had been given to him to produce it, and on an objection that for want of such notice, the witness could not speak to its contents,

Lord ELLENBOROUGH said, that being delivered to the plaintiff after the *subpœna duces tecum* had been served, and in fraud of that writ, *in odium spoliatoris*, parol evidence might be given. Otherwise a witness, being the friend of the party against whom he was subpœnaed, might always avoid the effect of the subpœna by delivering over the paper to the party.

The witness could not be induced to recollect the terms

terms of the letter, but another person by whom it was sent proved its contents; and this witness also proved a verbal offer of marriage to her a few days afterwards.

The plaintiff had 1 *s.* damages.

Erskine, Gibbs, and ——, for plaintiff.

Garrow and *Lawes* for defendants.

Keeling v. *Ball. K. B. Sittings at Guildhall after Easter Term,* 36 *Geo.* 3. p. 96).

DEBT on bond for 200 *l.* made by *John Ball,* the brother of the defendant, and to whom he was heir at law.

The declaration stated, that the bond was lost by accident. Pleas *non est factum* and *solvit ad diem.*

The plaintiff called a witness of the name of *Russell,* who proved that the plaintiff had delivered him a bond, purporting to be the bond of *J. Ball* and *Edward Ball,* and that he afterwards applied to the deceased *(J. Ball),* to pay the money due on the bond, when he acknowledged the debt and promised payment. He said that the bond was printed *in the common form* (*b*), and that there were subscribing witnesses names, but that he did not know the names of those witnesses, nor by whom the bond was prepared. That he afterwards delivered the bond to *arter,* the attorney, for the purpose of commencing an action against the deceased. *Carter* was next called, and proved that the bond was lost, while in his office.

GIBBS for the defendant, objected that the plaintiff should have called one of the subscribing witnesses to prove the execution of the bond, or else

(*b*) Which includes the word *heirs.*

have

shown that such witness wa[illegible] to the time been doubted, whether [illegible] or as the present, could be su[illegible] should not carry the indulgen[illegible] tiff, in this case, might be in [illegible] reason of the negligence of his [illegible] have been in had due diligence [illegible] the subscribing witness been ca[illegible] might cross-examine him as to [illegible] transaction. The attorney, *Carte*[illegible] had been guilty of some negligenc[illegible]gnt have kept a copy of the bond; and [illegible] that precaution been taken, the subscribing witness might have been called.

Lord KENYON said, that had it appeared who the subscribing witnesses were, the plaintiff must certainly have called them; but that it was the business of courts of justice, to apply the general principles of the law to new cases as they arise. This was a new case, for it did not appear that the plaintiff could, by any possibility, know who the subscribing witnesses were. If it was usual for men to keep copies of such instruments by them, the plaintiff's attorney, *Carter*, would certainly have been guilty of negligence, and the plaintiff could not avail himself of that negligence; but that was not the ordinary mode in which men conducted themselves. Suppose a fire had happened, and this bond had been destroyed by it, surely it would be adding calamity to calamity, to call on the party for more perfect evidence; and how could this case be distinguished from that? The general rule of law is, that the best evidence must be produced, which the nature of the case will admit of; and no better evidence could

(c) Vide *Reed* v. *Brookman*, 3 T. Rep. 151.

term been procured in the present case, than that which the plaintiff has given.

Verdict for plaintiff.

Garrow and *Abbot*, for plaintiff.

Cary v. *Pitt, Esq. K. B. Sittings at Westminster after Easter Term*, 37 *Geo.* 3. (p. 99, 102.)

ASSUMPSIT on a bill of exchange (drawn by one *Crofton*) against the defendant as acceptor. The defendant insisted that the acceptance was a forgery; and amongst other evidence, the plaintiff called a witness of the name of *Coulson*, who was an inspector of franks at the Post Office, to prove that he had frequently seen franks pass the office in defendant's name (he being a member of parliament), and that, from the character in which those franks were usually written, he believed this acceptance to be the defendant's hand-writing. He had never seen the defendant write, nor received any letters from him.

Lord KENYON said this was not admissible evidence. The furthest extent to which the rule had been carried, was to admit a person who had been in the habit of holding an epistolary correspondence with the party, to prove the hand-writing, from the knowledge he acquired in the course of that correspondence; a case reported by *Fitzgibbon* (*d*), was the first in which such evidence was admitted. That evidence was admitted on sound principles; for if, when letters are sent, directed to a particular person on particular business, an answer is received in due course, it is a fair presumption, that the answer was written by the person, whose hand-

(*d*) *Lord Ferrers* v. *Shirley*, Fitzg. 195.

writing

writing it purports to be; but the franks sent to the office might be the defendant's hand-writing, or they might be forgeries, as well as the present; for no communication was had on the subject with the defendant.

GARROW then asked the witness, whether, having been used to detect forgeries, he could say whether this was a genuine hand-writing, or otherwise.

Lord KENYON said, he could not receive this, and observed that, though such evidence was received in *Revett* v. *Braham*, he had, in his charge to the jury, laid no stress upon it.

Verdict for the defendant.

Erskine, for defendant.

Da Costa v. *Pym. K. B. Sittings at Guildhall after Trinity Term*, 37 *Geo.* 3. (p. 99, 101.)

DEBT on bond.—Plea, usury.

The proof of the usury depended on the authenticity of an account purporting to be signed by the plaintiff. The plaintiff contended it was a forgery, which was the only question in the cause.

Several witnesses were called to prove the hand-writing, who said they believed it to be the plaintiff's. One witness, on being asked the usual question as to his belief, said it was like it; but he did not think it was the plaintiff's hand-writing, because he knew the plaintiff to be a man too well acquainted with the world to sign such an account.

ERSKINE contended this answer was proper, and that it was like the case which arose on the hand-writing of Mr. *Mickle*, the translator of the Lusiad: Mr. *Caldecot* in that case was permitted to say, he thought it was not the hand-writing of Mr. *Mickle*, because he was a very correct man in making

capital or small letters, where each was required, but in the writing produced, that correctness was not observed.

Lord KENYON said that it was a very different case from the present. Mr. *Caldecot's* observations arose from the *character of the hand-writing itself*, but this witness takes into his consideration facts entirely unconnected with and extrinsic from the hand-writing. The jury may take all circumstances into their consideration, but the witness should form his opinion from the character of hand-writing only.

Several notes signed, &c. by plaintiff were produced to the jury, but Lord *Kenyon* said, the best rule was that laid down by Mr. J. *Yates* (*e*); for if the jury were to look at the papers, their judgment would depend on their knowledge of writing, which some might know better than others. It was best to rely on the evidence of those well acquainted with the character of defendant's hand-writing. The jury, nevertheless, were permitted to compare the different signatures.

Verdict for plaintiff.

Mingay, *Gibbs* and *Cooper*, for defendant.
Erskine and *Wood*, for plaintiff.

Raven & al. v. *Dunning and Chilton. K.B. Sittings at Guildhall after Trinity Term*, 39 *Geo.* 3. (p. 149.)

IN this action of *assumpsit* both the defendants pleaded the general issue, and *Chilton* also pleaded his discharge under a commission of bankruptcy, on which issue was joined. The plaintiff proved a joint contract, and then the defendant, *Chilton*, put in the commission against him and his certificate, which

(*e*) In *Brookhard* v. *Woodley*, ante, 100.

Law,

Law, for the defendants, contended, entitled *Chilton* to a verdict immediately; and that when that verdict was entered, he might be examined as a witness for the other defendant, in the same manner as was daily done in the case of trespasses.

Erskine, for the plaintiffs, objected to his testimony. While defendant on the record, he cannot be a witness; and he cannot be delivered from the record until the plaintiff's counsel has replied, and the jury have deliberated. For aught that appears to the contrary, the plaintiff may prove that the certificate was obtained by fraud, or that he had lost money by gambling, or other misconduct which would avoid it. This differs from the case of trespasses, for here the plaintiff must prove a joint contract; and even in trespasses, the jury are never directed to acquit a defendant, unless the plaintiff has failed in making out any cause against him.

Lord Kenyon said, he wished to admit the testimony, for the sake of the plaintiffs, (who had clearly proved their case), lest, in case of a mistake on his part, the cause should come down again; but that if the plaintiff's counsel insisted on their objection, he must reject his evidence, being most clearly of opinion in his own mind, that he could not be a witness. In trespass, if the plaintiff proves any case, the defendant has always been called upon to answer it by other evidence.

Erskine persisted in his objection, and the witness was rejected.

Verdict for the plaintiff—Damages 137*l.*

John v. *Fothergill & others. Monmouth Sum. Ass.* 1806. (p. 159.)

TRESPASS for breaking and entering the plaintiff's slate quarry, to which the defendant pleaded *liberum tenementum*, in Sir *Ch. Morgan*, of the waste lands in *Bidwelty*, and that the *locus in quo* was part of those waste lands, on which issue was joined.

Several persons were called as witnesses for the defendant, who being tenants of the lordship of *Machin*, in which *Bidwelty* was, were entitled to rights of common on the waste; and on their testimony being objected to, the defendant produced releases from them of their rights of common on the *locus in quo*.

It was then objected, that notwithstanding this release, the witness was still interested in the event of the cause; for as other persons had rights of common, if any part of the waste were taken away, their cattle would consume more of the remainder than they otherwise would do, and there would consequently be less pasturage, &c. for the witnesses on the other parts of the waste; and

LE BLANC, J. thinking this a good objection, the witnesses severally executed fresh releases of all rights of common upon any part of the manor or lordship, and were then examined without further objection.

Dauncey, *Bevan*, and *Abbott*, for plaintiff.

Williams, Serjt. *Milles*, *Hughes* and *Peake*, for defendant.

Monroe v. *Twisleton. C. P. Sittings at Guildhall, after Mich. Term,* 43 *Geo.* 3. (p. 171.)

ASSUMPSIT for the board and lodging of an infant child of the defendant.

To prove the contract, the plaintiff called Mrs. *Sandon,* who at the time of making it was the wife of the defendant, but had since been divorced from him by act of parliament, and was married again.

COCKLE, S. objected to her competence.

BEST, S. and PEAKE, contended that she was an admissible witness. It is true a wife cannot, while she remains so, be a witness either for or against her husband—not for him, because she has an interest to support his cause; nor against him, because it is the policy of marriage to create an union of interest and affection. When two persons are placed in the situation of man and wife, the law precludes every inquiry from either, which might break in upon the comfort and happiness of the married state, and therefore it will not suffer one to give evidence which may affect the other, because such evidence might, as Lord *Hale* expresses it, create implacable quarrels and dissensions between them. This lady, therefore, could clearly not have been a witness during the marriage, but the reason why she would then have been incompetent no longer exists: The bond of marriage is broken and at an end; the parties are in the same situation as if it had never existed, and the policy of the law no longer requires that terms of amity and friendship should subsist between them any more than between utter strangers. In determining on the competence of witnesses, the court is not to look to their situation at the time the fact happened to which they testify, but at the time they come to give evidence. If now competent, her situation at

that time can make no difference, and such was the opinion of the Court of King's Bench in *Wyndham* v. *Chetwynd* (*f*), where witnesses interested in a will at the time of subscription, but whose interest was removed at the time of giving testimony, were held competent. It is true that there were doubts of the propriety of the decision in that case, but an act of parliament afterwards passed to the same effect. It is no objection to say a witness was interested or infamous at the time of the transaction, if his interest or infamy has been since removed.

Lord ALVANLEY.—To prove any fact arising after the divorce, this lady is a competent witness, but not to prove a contract or any thing else which happened during coverture. She was at that time bound to secrecy; what she did might be in consequence of the trust and confidence reposed in her by her husband, and miserable, indeed, would the condition of a husband be, if when a woman is divorced from him, perhaps for her own misconduct, all the occurrences of his life, entrusted to her while the most perfect and unbounded confidence existed between them, should be divulged in a court of justice. If she might be a witness in a civil proceeding, she might equally be so in a criminal prosecution; and it never shall be endured, that the confidence which the law has created while the parties remained in the most intimate of all relations, shall be broken whenever by the misconduct of one party, for misconduct alone can have that effect, the relation has been dissolved.

The plaintiff called other witnesses, and obtained a verdict.

(*f*) Ante, 154.

Doe dem. Howell and others v. *Lloyd, cor. Lawrence, J. Hereford Sum. Ass.* 1806. (p. 107, 336.)

EJECTMENT for lands in *Carmarthen.*

Both parties claimed under one *Jno. Thomas*, who had devised the estate to several persons successively for life and in tail, with a reversion to his own right heirs; the lessor of the plaintiff contending that the reversion passed to her under the will of *David Thomas*, the eldest son and heir-at-law of the said *J. T.*—the defendant on the other hand contending that *D. T.* never made any valid will.

The will being above thirty years old, the lessor of the plaintiff called a clerk from the Ecclesiastical Court to produce it, and offered no evidence of the death or hand-writing of the subscribing witnesses.

When produced, the signature of the testator appeared to be a mere scrawl, quite illegible, evidently the attempt of some person to write, who, from weakness, or some other cause, was quite unable to do so; and one of the subscribing witnesses appeared to be a marksman. The lessor of the plaintiff had never been in possession of the land; the particular estates therein had continued till within the last twelve years, and during that time, till January last, the lessor of the plaintiff was under coverture.

It was objected, on behalf of the defendant, that under these circumstances the will could not be read without some evidence of its execution; for, in the first place, there was no possession under it to raise a presumption in its favour; and 2dly, the appearance of the instrument itself was such as to create a suspicion that it was not properly executed. The writing which purported to be the signature of the testator was not such as any literate man would make, in full possession of his faculties; and if it was

to

to be considered as nothing more than a mark, one of the subscribing witnesses ought to have certified it to be so, by writing the mark of *D. T.* opposite to it.

LAWRENCE, J. said, that coming from the Ecclesiastical Court, which was the proper custody, and that court having granted probate of it, the instrument proved itself; and as to the objection on account of the testator's hand-writing not being legible, the witnesses had in their attestation certified it to be *signed* by him; whether such signature was to be considered as a name or a mere mark, it was equally the signature of the testator, and attested as such by the witnesses.

The defendant then put in the original purchase deed of *John Thomas* in the year 1730, whereby the premises were conveyed to *Jno. Thomas* and one *Edw. Davies*, (who it was proved had survived *Thomas*), and their heirs, to the use of them and their heirs, in trust nevertheless as to the estate of *Davies*, for *Thomas*, his heirs, &c.; and on this evidence it was contended, that the plaintiff must be nonsuited for want of a count on the demise of the heir-at-law of *Davies*, to whom the legal estate survived. The plaintiff proved that *Thomas*'s wife died in his lifetime.

LAWRENCE, J. told the jury that the conveyance could only be taken in this form, for the purpose of preventing *Jno. Thomas*'s wife from claiming dower in the lands, that such purpose had long since been completely fulfilled, and therefore they might presume that *Davies*, or his heir, had conveyed his legal interest to *Thomas*, after the death of his wife, or to some of his descendants since. Under this direction the jury presumed a conveyance, and found a verdict for the plaintiff.

Williams, S. and *Dauncey*, for the plaintiff.

Abbott, *Peake*, and *Lord*, for the defendant.

In

In the following term a motion was made to enter a nonsuit, on the ground that there was no evidence to presume a surrender, but the court refused a rule to show cause.

Knobell v. *Fuller and another, cor. Eyre, C. J. Sittings after Trin. Term,* 1797. (p. 308.)

In an action for a libel, the defendant may prove in mitigation of damages, any ground of suspicion short of facts, which would, if pleaded, have amounted to a complete justification, on the general issue.

ACTION on the case for a libel, published in the *Morning Post* of the 16th of January 1797, charging the plaintiff with being concerned with *Launcelot Knowles* in procuring money from the relations and friends of persons convicted of capital offences, under pretence of being able to procure pardons through the interference of the Duke of Portland, in whose service the plaintiff was (*g*).

The defendant pleaded the general issue; and in mitigation of damages offered evidence to prove that though the plaintiff was not prosecuted for the offence, as *Knowles* had been, there was nevertheless strong grounds of suspicion against him.

The Chief Justice at first doubting the admissibility of this evidence,

ADAIR, S. for the defendants, admitted, that the defendants could not give in evidence on the general issue facts which, if pleaded, would have amounted to a justification; but contended that they might

(*g*) The following is a copy of the libel. "The proverb that one man may *steal a horse* while another dare not look *over the hedge*, was never more fully verified than in the case of the persons concerned in procuring pardons. *Launcelot Knowles*, evidently the *agent* and *dupe* of Knobell, has been tried and deservedly convicted; but the latter, the *honest* and *faithful* servant of his Grace of Portland, though the *principal* actor in the abominable practices, being a *foreigner*, and having good friends, is suffered to escape punishment, and permitted to enjoy the full exercise of his liberty. This is *justice* from an *offender* who *ought* at *least* to have accompanied his wicked acquaintance to Botany Bay."

prove

prove facts which showed there was cause of suspicion, and therefore proved that the defendants were not induced to publish this paper by reason of malice against the plaintiff, but for the purpose of conveying information to the public, this being a concern of a public nature; and *Runnington*, S. who was on the same side, read a note of a case of *Curry* v. *Walter*, C. B. Sittings after Hil. Term, 36 Geo. 3, where *Eyre*, C. J. admitted the distinction, and received such evidence.

EYRE, C. J. said, he believed that in that case he admitted the evidence, in order to show that the defendant had not in fact published a libel, he having only published the proceedings of a court of justice, which the court afterwards determined to be no libel in point of law; but he would not deny, but he might also have received it in mitigation of damages; for though he had never known the evidence given in an action for a libel, yet he had always understood that in an action for words, the defendant might, in mitigation of damages, give any evidence short of such as would be a complete defence to the action, had a justification been pleaded.

The defendants then called Mr. *Ford*, a magistrate, to prove that on the examination of the plaintiff before him, he admitted that he had received five guineas for conveying a letter to the Duke; and the Duke himself being examined, said, that thinking the plaintiff had misconducted himself in that respect, he had discharged him from his service.

The jury nevertheless found a verdict for the plaintiff (damages, 200 *l.*) against the defendant *Fuller*; the other defendant, not being proved to be a proprietor of the paper, a verdict was found for him.

Shepherd, S. for the plaintiff.

Doe dem. Bailiff and Burgesses of Clun v. *Clarke and others. Salop Sum. Ass.* 1809. (p. 339.)

THIS was an ejectment against several persons who defended jointly.

On the opening of the case, it appeared that the defendants being severally possessed of cottages, which the lessors of the plaintiff contended were within the wastes of the *borough*, and encroachments upon them, had severally paid rent to the corporation each for his own tenement. That afterwards they refused to pay more rent, and disputed the title of the corporation.

It was hereupon objected by *Abbott*, for the defendant, that the plaintiff could not proceed against more than one defendant, without proving them joint trespassers, and therefore, as they were now admitted to be several, he must make his election to proceed against one only.

But BAYLEY, J. said, that he thought this was not like a mere action of trespass, but that the plaintiff might recover from each defendant in a joint action, the tenement in his several occupation. This point, however, he saved for the opinion of the court, if the defendant thought proper to move.

The defendant's counsel then cross-examined the plaintiff's witnesses, to show that the waste on which the cottages were erected was part of the *lordship* of *Clun*, which belonged to Lord *Powis*, and therefore it was that they disclaimed to hold longer under the lessors of the plaintiff.

DAUNCEY, for the plaintiff, contended, that the defendants having paid rent to the lessors of the plaintiff, were estopped from controverting their title.

BAYLEY, J.

BAYLEY, J.—The defendants having disclaimed to hold under the plaintiffs, are not in the same situation as a tenant who has always admitted his landlord's title. The disclaimer was a notice that they meant to contest the title; and, therefore, though I shall receive the payment of rent as *primâ facie* evidence of the lessor of the plaintiff's title, and they are put thereby in the same situation as if they were defendants relying on their possession; yet it is merely *primâ facie* evidence, and the proof of title in any other person will be an answer to such *primâ facie* case made by the lessors of the plaintiff, and call on them to prove their title.

The defendants failing in proving that Lord *Powis* was entitled to the cottages, the plaintiff had a verdict against two of the tenants who had disclaimed; the others who had not disclaimed were acquitted for want of notice to quit.

INDEX.

A.

ABATEMENT, (Pleas in),
not necessary when one of several partners sues in contract, 212.
aliter in trespass or *tort*, ib.
but the title of tenants in common may be given in evidence in reduction of damages, ib.
one of several partners sued in contract must plead, ib.
so if action arising in contract is declared on in *tort*, ib.
but in action founded on common law duty, no such plea lies, ib.
as against carrier on custom of realm, ib.
nor in cases of mere *tort* or trespass, 213.
if plaintiff sues several in contract, he must recover against all or none, ib.
aliter in trespass or *tort*, ib.
ACCESS. See *Husband and Wife. Legitimacy.*
presumption of, 380.
by what evidence rebutted, 381.
ACCESSARY. See *Accomplice.*
judgment against principal not conclusive against accessary, 76.
ACCOMPLICE,
when a witness for prosecutor or plaintiff, 136. 142.
for defendant, 148.
ACCORD AND SATISFACTION,
Payment of less sum after promise broken,
no evidence of, 265.

ACCOUNT STATED,
proved, though reckoning all on one side, 252.
by admission of having lopped and cut down trees sold by plaintiff for a certain sum, ib.
by partnership account carried to new firm, ib.
but not by money due from defendant in *autre droit*, 254.
ACQUITTAL. See *Judgment*.
ACTION,
when the writ is evidence of its commencement, and how proved, 30. 50.
evidence of writ continued, 291.
ACT OF PARLIAMENT,
public, taken judicial notice of, 30.
private, proved by examined copy, 31.
Irish, in the same manner, ib.
ACT OF STATE,
proved by gazette or proclamation, 77.
ADDRESS TO THE KING,
proved in the same manner, 77.
ADMINISTRATION, (Letters of),
proved by production, 67. 71.
book of court, 368.
disproved by showing *bona notabilia*, ib.
or insufficient stamp, ib.
a repeal, 68.
but not by showing that the administrator was not entitled to, ib.
ADMINISTRATOR. See *Executor*.
ADMIRALTY COURT,
its proceedings conclusive in cases within its jurisdiction, 67.
proved by copies, 70.
ADMISSIONS. See *Affidavit*. *Answer*.
of third person to whom reference made, 11.
of party in a cause, 20.
of person on whose behalf it is brought, ib.
of one inhabitant of a parish against others, ib.

ADMISSIONS—*continued.*
of one partner against others, 54.
of one of several makers of a joint and several note, 273.
of wife against her husband, 21. 247.
herself, 21. 54.
of attorney against his principal, 21.
of servant or agent, 22.
of under-sheriff or bailiff, ib.
of guardian against infant, 54.
the whole admission to be taken, 20.
offer of compromise not considered as such, 23.
nor confession of felon obtained by threat or promise, 24.
Acts amounting to:
acting as parson of A. 24.
as a licensed postmaster, 25.
as the husband of B. ib.
Treating with another as filling a station:
taking tithes of clergyman, 25.
accounting with plaintiff as the farmer of post-horse duty, ib.
accounting with plaintiff as assignee of bankrupt, 358.
suffering a third person to pass as owner of a ship to defraud the government, 25.
ADMITTANCE OF COPYHOLDER,
in what cases necessary, and how proved, 456.
ADULTERY, action for,
proof of marriage, 352.
misconduct of wife, 6. 353.
of husband, 353.
letters from one to the other, ib.
AFFIDAVIT. See *Admission.*
evidence against the party, 57.
his partner, 54.
how proved, 57.
AFFIRMATIVE,
the party making it to prove, 4.
exception where party charged with not performing a duty, 5.

AFFIRMATIVE—*continued.*
exception where presumption of affirmative would imply crime or negligence, 5. 379.
in what cases the party making is entitled to general reply, 4.
AGENTS,
admissions by, when evidence, 22, 23.
what acts done by them admissible as evidence against a prosecutor or plaintiff, 7.
when witnesses for principal, 160.
when personally liable, 223.
AGREEMENT FOR LEASE. See *Lease.*
ALIA ENORMIA,
what evidence under it, 323.
AMBIGUITY, in written instruments,
1. Latent,
Explainable by parol testimony:
two persons or estates of same name, 112, 113.
mistake in name of devisee, 112.
land formerly one tenement divided, 114.
Not explainable so as to *enlarge* the grant:
where there is sufficient certainty so as to satisfy the intent of the instrument according to one meaning, 114.
Lord Bacon's maxim and observation thereon, 114.
Decisions upon it:
devise of estate at A. 115.
estate of B. ib.
estate in C. ib.
estate in A. which I lately purchased of B. 116.
Not explainable so as to *narrow* the grant:
where there is sufficient description at first, but some unnecessary words added, 117.
Decisions on this point:
grant of tithes in the parish of A. all which are in the occupation of B. 118.
devise of Trogues Farm, in the occupation of B. ib.

AMBIGUITY—*continued.*
all my Britton Ferry estate, described in subsequent part of will as situate in G. ib.
2. Patent:
in general not explainable, 120.
Lord Bacon's maxim on this point, ib.
observations thereon, ib.
Instances of explanation received:
in mercantile instruments, 121.
consideration of deed taking effect under statute of uses, ib.
presentation with blank left for name of patron, ib.
ambiguous words in ancient instruments, 122.
Instances of explanation refused:
to add to contract which by statute of frauds must be in writing, 121.
to fill up blank with name of devisee, ib.
to explain meaning of a covenant by subsequent act of parties, 124,
3. Presumptive construction of law as to intention,
controlled by parol testimony, 119.
surplus of personal estate, ib.
fine levied without deed to lead uses, ib.
will supposed to be revoked by subsequent marriage, 120. 402.
ANCIENT DOCUMENTS,
should always come from the proper custody, 86.
what is so, 86. 94. 101.
ANIMAL, MISCHIEVOUS,
Action for keeping:
evidence required to support it, 312.
ANSWER IN CHANCERY. See *Admission.*
Against whom evidence:
party or privy, 53.
partner, 54.
guardian of infant putting it in, ib.
but not against the infant, 53.
nor feme covert, 54.

ANSWER IN CHANCERY—*continued.*
To what extent:
as to all facts and with all limitations contained in it within the defendant's personal knowledge, 54.
when second answer read to explain first, ib.
For whom evidence:
any person interested in the question, 54.
How proved:
by examined copies of bill and answer, 55.
no further evidence of identity required in a civil suit, 57.
in criminal cases the original must be produced, and the hand-writing of the party and master proved, ib.
APPRENTICE,
Action for enticing or harbouring:
evidence required to support it, 355.
ARTICLES OF WAR,
how proved, 77.
ASSIGNEE OF BANKRUPT. See *Bankruptcy.*
not liable for rent accrued before he took possession, 255.
nor as assignee of a term unless he accepts it, 285.
putting up premises to auction not an acceptance, ib.
aliter if he keeps possession from landlord, ib.
ASSIGNEE OF TERM. See *Assignee of Bankrupt.*
evidence in action against, 283.
possession *primâ facie* evidence of assignment, ib.
but may be rebutted by showing that defendant has not the whole estate, 284.
quære, whether mortgagee can be so charged, 285.
ASSIGNEE OF REVERSION,
evidence in action by, 283.
need not prove title precisely as laid, ib.
payment of rent by defendant evidence of assignment, ib.
ATHEISTS,
cannot be witnesses, 139.
ATTORNEY. See *Admission. Interpreter.*
not to reveal or prove confidential communications, 172.

ATTORNEY—*continued.*
What communication considered confidential:
proceedings under commission of bankrupt to which he was clerk, so held by Lord Kenyon, *contra* by Lord Ellenborough, 365.
facts communicated by his client as instructions in a cause, 173.
What not:
the circumstances attending the execution of a fraudulent deed, 173.
instructions received as an agent when no cause in contemplation, 174.
seeing his client sworn to an answer, ib.
facts communicated after cause ended, ib.
or communicated *by witness* on examination by attorney when preparing for a cause, 175.
or notice delivered to him by attorney on the other side, ib.
Evidence in action for his bill:
delivery of bill, 261.
what deemed a delivery, ib.
his executors need not give such evidence, 262.
nor need he when he sues another attorney, ib.
or seeks to set off his bill, ib.
what bill within the statute, 261.
retainer by defendant and business done, 262.
AUCTION. See *Frauds (Stat. of)*
the particulars of sale not varied by parol declaration, 111.
AWARD,
evidence in action on original consideration, 71.
or on the award, ib.
or on account stated, ib.
How proved:
by evidence of the submission and award, ib.
when general submission open to explanation, 111.
must be stamped, but appointment of umpire need not, ib.

B.

BAIL,
not competent as witness for the defendant till struck out, 167.
but may be called by the plaintiff, 180.

BAILIFF,
evidence in action against, 411. See *Sheriff*.
his admission not evidence against the sheriff, unless as part of the *res gesta*, 22.

BANK BOOKS,
evidence of transfer, 243.
proved by examined copies, 89. 243.

BANKER'S CHECK,
payment of, no proof of debt, 253.
drawing of, no proof of payment, unless endorsed, 268.

BANKRUPTCY,
who may be witnesses in cases of. See Digest (C.) 163.
witness may be brought before commissioners by *habeas corpus*, 198.
assignment relates back to act of bankruptcy, 359.
but bargain and sale not beyond enrolment, ib.
1. Evidence generally required in action by assignees as such, 356.
Commission:
what description sufficient, 357.
petitioning creditor's debt, ib.
how proved if assignees or executors, ib.
trading, 356.
act of bankruptcy, 357.
what declaration of bankrupt evidence for this purpose, ib.
This proof not necessary:
when the defendant has admitted the plaintiff's title, 359.
but having proved debts under the commission is not such admission, ib.
Where no notice given:
proceedings will be evidence for a plaintiff, 358.

BANKRUPTCY—*continued.*
but defendant may disprove the facts stated, 358.
In what cases notice necessary:
when the assignees are substantial parties, 359.
though not so named on record, ib.
but not when other persons are parties, ib.
2. Evidence in the action by assignees on contract made with themselves:
need not prove bankruptcy, &c. 360.
3. Evidence in action by bankrupt disputing commission:
defendant must prove same facts as plaintiff in former case, 360.
admissions by bankrupt evidence against him, 357.
4. Evidence in action against bankrupt:
in what cases he is discharged from covenants in lease, 255.
plea of certificate, 361.
evidence to support it, ib.
evidence to defeat it, ib.
fraud in obtaining it, ib.
money given to creditors, ib.
concealment of effects, ib.
bankrupt may prove it not wilful, ib.
money given to children, ib.
money lost at play, 362.
money lost by contract for sale of stock, ib.
certificate signed by fictitious creditor, 364.
petitioning creditors within the stat. ib.
former discharge, and estate under 15*s.* in the pound, ib.
production of first commission and proof of defendant's submission, sufficient, 365.
quære, whether creditor who has proved his debt may now avail himself of this clause, ib.
Subsequent promise:
what proof sufficient, 366.

BARRATRY,
evidence in indictment for, 6.
BARRISTER,
not permitted to reveal confidential communications, 172.
what is. See *Attorney*.
BARON AND FEME. See *Husband and Wife*.
BASTARD. See *Legitimacy*.
may be examined as to his own illegitimacy, 178.
BILL IN CHANCERY,
when evidence of facts stated in it, 13. 53.
how proved, 35.
BILL OF EXCEPTIONS,
when it lies, 3.
BILL OF EXCHANGE,
evidence in actions on. (See *Stamps*).
1. In general:
if instrument on improper stamp, plaintiff may go on consideration, 321.
provided his counts and particulars of demand extend to it, 208. 231.
particulars, stating only the note, not sufficient in this case, 208.
Notice of dishonour:
When dispensed with:
by one partner drawing on another, 234.
by drawer saying it would not be paid, ib.
by his having no effects, ib.
by his subsequent promise, ib.
Proof of notice:
by protest, 71. 234.
by letter, 104. 234.
notice to produce in this case, ib.
Who may be witnesses:
For defendant,
party to prove payment, 161.
or usury, 150.
quære in case of accommodation bill, 151.

BILL OF EXCHANGE—*continued.*
or instrument void for want of stamp, 176.
or that it was not a partnership transaction, ib.
but not to prove that he endorsed it to plaintiff to receive as his agent, 169.
For plaintiff:
acceptor to prove that drawer had no effects, 150.
joint-maker to prove signature of defendant, 169.
2. Evidence in particular cases:
payee against acceptor, 232.
authority to accept, ib.
written acceptance admits drawer's hand, ib.
presentment, when accepted at particular place, ib. *Vide* stat. 1 & 2 Geo. 4, ch. 78, *Addenda.*
need not prove notice, ib.
endorsee against acceptor, 231.
hand-writing of endorser, &c. ib.
when necessary to prove consideration, ib.
usury no defence in such case, ib.
gaming is, ib.
endorsee against endorser, 233.
endorsement, presentment, and notice, ib.
endorsee against drawer, 234.
drawer against acceptor, ib.
BLACK ACT,
evidence in action on, 301.
BODLEIAN LIBRARY,
BRITISH MUSEUM,
ancient documents there as matter of curiosity, not evidence *per se*, 86.

BONA NOTABILIA. See *Administration. Executor. Will.*
BOOKS,
Private, of deceased persons:
entries of receipts by steward charging himself, 14. 460.
by officers of township, 14.
officers of parish, as to repair of pew, 15.
incumbent, as to tithes, ib.
lay impropriator, ib.
entries of payments by steward, 16.
servants in the ordinary course of business, 18, 19.
attorney's book of fees, 18, 19.
man-midwife's book, 18.
Public,
doomsday, 82.
survey of the ports, ib.
of the Navy Office, 78.
prison, ib.
man of war, ib.
Bank, 89. 243.
India House, 89.
corporation, 88.
parish registers, 83.
the Fleet, 84.
quarter sessions, 78.
clerk of the peace, ib.
BOUNDARY of county or parish,
may be proved by reputation, 15, 16.
and declarations of deceased parishioners before dispute admissible, 15.
but not as to particular facts, 16.
inhabitant witnesses to prove, 156.
unless directly interested, 157.
and by stat. 54 Geo. 3. made witnesses in all cases, 157, 158, pl. 6.
BULL (Papal),
when evidence, and how proved, 88.

C.

CARRIAGE,
Action for running down,
evidence to support it, 314.
for what act of servant master liable, 315.

CARRIER,
Delivery to,
when evidence of delivery to purchaser, 246.
effect of paying money into court in action against him, 209.

CASE,
Action on the,
general observations on, 302. See *Particular Titles.*

CERTIFICATE. See *Bankrupt. Enrolment.*

CHANCERY,
Bill,
when evidence, 53.
how proved, 32.
Answer. See *Answer in Chancery.*
what proof necessary to show the proceedings 64. 66.

CHARACTER,
when in issue, 6.
of plaintiff's wife in action for crim. con. 6. 353.
of his daughter, in action for seduction, 355.
of plaintiff, in action for slander, 308.
Of subscribing witness who is dead, or living witness examined:
how supported, 6.
attacked, 129.
Evidence in action for giving a false character:
must show the *scienter* of the defendant, 311.

CHARTER,
How proved,
by exemplification, 32.
presumed from length of time, 27.

CHARTULARY of an Abbey,
Coming out of hands of persons interested in their possessions,
evidence, 86.
aliter if from custody of a stranger, ib.
CHILDREN,
When witnesses, 127.
CHIROGRAPH OF FINE,
to what extent evidence, 35.
CHRONICLES,
when evidence, 80.
CLERGY. See *Ecclesiastical Persons.*
Benefit of,
effect on competency of witness, 135.
CLERK OF THE PEACE. See *Books.*
CODICIL. See *Will.*
COGNOVIT,
Money paid under, not recoverable back, 37.
COMMISSION,
public, 82.
COMMON AND COMMONER,
Evidence in action for the invasion of right,
For the plaintiff:
twenty years undisputed enjoyment, 315.
reputation no evidence of prescriptive right, ib.
but it may be received to narrow the exercise of it when many persons interested, 318.
What invasion of right sufficient:
turning on cattle, 319.
taking away dung, ib.
For the defendant:
twenty years adverse possession, 317.
Who may be witnesses:
persons claiming under similar prescription, 159.
Who may not:
those claiming under the same custom, ib.

COMMON AND COMMONER—*continued.*
or those claiming under a similar prescription, to show liability of third persons to repair the fences, ib.
or corporator (the corporation being lord) to show sufficient common left, 158.
or other persons claiming common to disprove right of party. Appendix, xxxviii.
When evidence of reputation admitted:
to narrow prescription in common field, when many proprietors, 318.
but not to prove the right against third person, 317.

COMMONS, (Journals of House of),
evidence of, and their effect, 52.

COMPARISON OF HANDS,
how far evidence of hand-writing, 100.

COMPOSITION. See *Tithes.*

COMPROMISE,
offer of, no proof of debt, 23.

CONDITION, PRECEDENT,
what is, and when necessary to prove performance, 240.

CONFESSION. See *Admission.*
Of a prisoner,
when evidence, 24.
Of a party,
does not avoid the necessity of proving a deed, 95.
Of a witness,
evidence against his testimony, or to rebut presumptions arising from his hand-writing, 129.

CONFIDENCE. See *Attorney. Barrister.*
rule does not extend to medical attendants, 175.
but it does to an interpreter acting between an attorney and his client, 173.

CONSIDERATION of a deed,
when it may be supplied by parol evidence, 121.

CONSPIRACY,
general evidence of, 7.

CONSPIRACY—*continued.*
of witnesses do defeat justice, or support unfounded prosecution, 8.
CONSTABLE. (The statutes, see title "Justice".)
Action against,
when a demand of warrant is necessary, 431,
not when he acts without or beyond the warrant, ib.
what demand is sufficient, 434.
action in all cases to be brought within six months, 432.
how reckoned, 433.
when conviction a defence, 434.
CONTINUANCE. See *Writ.*
CONTRIBUTION. See *Indemnity.*
CONVICTION.
conclusive till quashed, 75.
COPIES,
of records, 31, &c.
of other documents, 89.
office copies, what and when evidence, 35.
COPYHOLD. See *Copyholder. Custom. Court Baron. Will.*
COPYHOLDER,
Proof of title by,
court rolls, 85.
heir need not prove admittance, 456.
nor remainder-man, if tenant for life admitted, ib.
nor grantee in remainder during possession of grantee for lives, ib.
devisee must, ib.
and cannot devise before, ib.
Will of,
when surrender necessary, ib.
what execution sufficient, 457.
what not, 458, 459.
Claim by lord,
in respect of forfeiture, 459.
pro defectu tenentis, 460.
for a fine on admission, 461.

COPYHOLDER—*continued.*
Evidence of custom:
by court rolls, 85. 460.
inspection thereof. Vide *Inspection.*
by customary, ib.
by steward's books, 85. 460.
by other ancient documents, ib.
by parol evidence, ib.
when mode of descent among sisters will be evidence of mode among other female heirs, 462.
what number of instances necessary, ib.

CORPORATION BOOKS.
when evidence, and how proved, 88.
evidence of the rights of individual corporators, ib.
but not against the rights of third persons, ib.
what considered as an original book, 84.
Inspection of, when granted:
to members of corporation, 90.
but not to strangers, ib.
not to support criminal proceedings against persons holding them, 91.
confined to the subject in dispute, 92.

CORPORATORS,
When witness. See Digest, letter (A.) 156.

COVENANT. See *Assignee*, &c.
action of, 281.

COVERTURE,
plea of, 279.
proof of, by defendant, ib.
evidence on *non est factum*, 282.
evidence of marriage, and existence of husband, 280.
Avoidance by plaintiff:
banishment or transportation of husband, ib.
alien absent, ib.
husband abroad seven years, ib.
wife parted from husband no answer, ib.
promise by her after his death, when valid, ib.

COUNTERPART OF DEED,
is evidence without notice to produce original, 94.
COURTS. See *Admiralty Court. Affidavit. Answer. Bill. Chancery. County Court. Court Baron. Depositions. Ecclesiastical Court. Foreign Court. Judgment. Record.*
COURT BARON,
Evidence of its proceedings:
by its rolls, 85.
their effect, ib.
inspection thereof. See *Inspection.*
COURT MARTIAL,
Witness may be brought before,
by *habeas corpus*, 198.
proceedings not producible, 90.
CRIMINAL CONVERSATION,
Evidence in action for,
For plaintiff:
marriage, 352.
seduction of affection, 353.
letters between husband and wife, ib.
loss of fortune, ib.
For defendant:
loose character of wife, ib.
ill treatment by husband, ib.
separation from the husband, 354.
CUSTODY,
no documents evidence on account of their supposed antiquity, unless they come out of the proper custody, 86.
what is so, ib. 102. 106. See *Bodleian Library. British Museum.*
CUSTOM,
Pleading of,
must be correctly stated, 204.
Proof of,
by reputation, 12. 460.
by the rolls of a manor, 85. 460.
by customary of manor, 88.

CUSTOM—*continued.*
the custom of one manor or parish is not evidence of that of another, unless in the case of a general quality, 204.
and when pleaded as the custom of the whole district, ib.
CUSTOMARY OF MANOR,
how proved, and when evidence, 88.
CUSTOM HOUSE BOOKS. See *Books.*
CUSTOM HOUSE OFFICER,
action against, 430.
when plaintiff must prove commencement of action, and how, 433.
of the notice, &c. required by the statute, 432.
when he is within its protection, 434.
what notice is sufficient, 432.

D.

DAMAGES,
Assessment of, under the statute:
proof required of the suggestion, 287.
idendity of bond, ib.
damages sustained, ib.
DAUGHTER,
action for seducing, 355. See *Seduction.*
DEATH,
the party alleging must prove, 379.
Evidence of,
reputation of family, 13.
old entries, ib.
public books, 78.
parish register, 92.
when presumed from length of time, 379.
when from second marriage of wife, ib.
DEBT,
action of, on specialties, 286.
proof of damage under statute, 287.
on simple contracts, 288.

DECEIT,
action for, 311.
in what cases the *scienter* must be proved, 201. 242. 311.
DECLARATION, without oath. See *Admission. Dying Declaration.*
may be evidence where the party agrees to rest his cause upon it, 11.
DECREE OF CHANCERY,
For and against whom evidence:
only parties and privies, 66.
unless in questions of public right, ib.
How proved:
by examined copy of bill, &c. 67.
DECREE OF ECCLESIASTICAL COURT. See *Ecclesiastical Court.*
DEED. See *Non est factum.*
1. The regular evidence of,
production of original, and proof by one subscribing witness, 93. 95. 99.
he must be called, though party has admitted the deed in answer in Chancery, 95.
but not where he has admitted it before commissioners of bankrupt, ib.
or undertaken to admit it on trial, ib.
no subscribing witness necessary, 96.
if none, or he denies having seen the deed executed, party may prove hand-writing, ib.
how production enforced when in possession of third person, 95.
effect of *subpœna duces tecum*, ib.
counterpart sufficient, 93.
2. Secondary evidence of,
when subscribing witness dead,
by proof of his hand-writing, 95.
so if abroad, ib.
whether resident there or not, ib.
so if insane, ib.
or become interested, ib.
or infamous by crime, 95.

DEED—*continued.*
when the deed is lost, 94.
what circumstances sufficient to prove loss, ib.
subscribing witness, if living and known, must be called in this as well as other cases, 95.
aliter, if not known, ib.
how to be pleaded in such case, 281.
when the deed is in the possession of the adverse party, 103.
proof of such possession, 103.
presumed to be so if he be the proper depositary, 104.
notice to produce, ib.
effect of deed produced under notice, 105.
must be proved by subscribing witness, if party producing is not a party or person claiming under, ib.
aliter if he is so, 105, 106.
how to be pleaded in such cases, 281.
3. In what cases execution presumed;
from length of time, 106.
must come from proper custody, ib.
what proof required of custody, ib.
presumption does not arise in cases of erasure or manifest fraud, 107.
when presumed from recital in other deeds, ib.
from being enrolled, 108.
when evidence of title for the party or his descendants, 109.
not to be contradicted by parol evidence, 110.
unless in case of fraud, 111. 126.
when explained by parol evidence,
in cases of latent ambiguity, 110, &c. See *Ambiguity*.
Enrolment of,
in what cases enrolment evidence of deed, 108.

DEMURRER to evidence,
when it lies, and its effect, 3.

DEMURRER—*continued.*
party demurring must admit facts and not merely evidence, 3.
DEPOSITIONS OF WITNESSES,
in general only evidence against parties or privies, 62, 63.
unless in cases of public right, ib.
when against third persons, vide *post*, No. 5 and 6.
What previous proof necessary:
death of witness, 58.
his having become interested, ib.
or blind since he swore to writing, ib.
or being out of the kingdom, 60.
In cases where interrogatories are leading,
deposition suppressed, 65.
or not read, ib.
exception in the case of old depositions, ib.
1. In the Court of Chancery, 58.
how proved, 65.
regularity of proceedings, ib.
in case of loss, 66.
2. In Ecclesiastical Court, 67.
3. In a cause by rule of court, 59.
proved by copy delivered by judge's clerk, 36.
4. In India, by stat. 13 Geo. 3, 59, 60.
5. Before justice of peace, 59.
in cases of felons, 60, 61.
when necessary for prisoner to be present, 61.
in respect of bastard children, ib.
under mutiny act, as to soldiers settlement, 36, 61.
evidence against third parties, 61.
of a common pauper, 61, 62.
not evidence against third persons, ib.
must prove magistrate's hand-writing, 36.
6. Before commissioners of bankrupt, 63.
evidence against all persons as to act of bankruptcy, &c. 64.
7. Before judge on former trial,
postea produced, 59.
proof of former evidence, ib.

DEPOSITARY. See *Custody.*
DEVISEE,
proof of title by,
seisin of testator, 382.
devise to him. See *Will.*
action against, on bond of his testator, 410. See *Heir.*
DILAPIDATIONS,
action for, 448.
DIPLOMA,
how proved, 71.
DISTRESS,
money paid under, not recoverable in action for money had and received, 37.
DISTURBANCE,
action for,
twenty years undisputed possession evidence of right, 315.
the like time of *non user* evidence to destroy it, 317.
other evidence to rebut presumption, 318.
DOOMSDAY BOOK,
evidence, 82.
DYING DECLARATIONS,
of person murdered, 19.
of felon at the place of execution, 20.
of witness to a deed or will, 129.

E.

ECCLESIASTICAL COURT,
Sentence of—against whom evidence:
on the right of representation or to probate, evidence against all persons in civil suits, 67. 77.
but not in criminal cases, 76.
How proved:
by letters of administration or probate, 67. 71.
books of ordinary, 368.
How defeated:
by showing *bona notabilia*, 68. 368.
or wrong stamp, 368.

ECCLESIASTICAL COURT—*continued.*
or repeal, 68.
or seal forged, ib.
but not by showing that grantee was not entitled to administration, ib.
on the right of marriage, when directly in question, 67.
or sentence annulling, 74, 75.
in a case of jactitation, 47. 75.
or for restitution of conjugal rights, ib.
but not when it does not come directly in question, as in suit against father and mother for fornication, 44.
but third persons may show fraud, 75, 76.
ECCLESIASTICAL PERSONS. See *Dilapidations. Ejectment. Modus. Non-residence. Tithes.*
EJECTMENT,
Plaintiff's evidence in general:
legal title, 327.
actual entry—when, 327, 328, 329. 333. See *Entry.*
in what manner, 329.
commencement of action, 333.
actual ouster, when, and how proved, 331. 334.
disability to avoid statute of limitations, 332.
defendant's possession by the rule, 334.
Defendant's evidence in general:
legal title in some other person, 335.
outstanding term, 336.
when surrender presumed, ib.
not to be set up by tenant or mortgagee, 338.
Ejectment by different persons,
1. by tenant in common, 331. 334.
2. by landlord against tenant. See *Landlord and Tenant.*
3. by mortgagee, 347.
4. by tenant by elegit, 348.
5. by conusee of statute merchant, ib.
6. by assignee of bankrupt for his real property. *See Bankruptcy.*

EJECTMENT—*continued*
must prove bargain and sale enrolled before demise, 360.
7. by parson for his parsonage, 440.
8. by copyholder. See *Copyholder*.
9. by lord for a forfeiture. See *Copyholder*.
ELEGIT,
ejectment on, 348.
ENDOWMENT,
proved by ecclesiastical survey and perception of small tithes, 83.
which gives right to small tithes of articles of modern introduction, ib.
should come from the custody of some person connected by estate with the living, 86.
ENTRY, actual,
1. To avoid fine,
when necessary, 328.
not if levied by tenant for years, 329.
or by tenant in common before ouster, ib.
or without proclamations, ib.
or where ejectment brought before proclamations complete, ib.
Who may avail himself of,
party assenting, 328.
remainder-man, ib.
proof of, 329.
action brought within a year, 333.
2. To avoid the statute of limitations, ib.
ENTRIES, by deceased persons,
when evidence, and how proved, 14 to 19.
by steward charging himself, 14. 460.
or of having paid modus, 16.
by officers of township or parish, 14, 15.
by deceased incumbent, 15.
by deceased lessee of impropriate rectory, ib.
what evidence of hand-writing in such cases, 101.
by clerk, shopman, or porter, 18, 19.
by solicitor in his bill book, ib.

ENTRIES—*continued.*
by midwife in his bill book, 18, 19.
by party himself of copies of letters, 18.
in public books. See *Books.*
ESCAPE,
Evidence for plaintiff in action for,
of prisoner on mesne process, 417. See *False Return.*
of prisoner in execution,
judgment, writ and return, 421.
of prisoner being in custody, ib.
acknowledgment under statute, ib.
assignment by former sheriff, 422.
by commitment, ib.
by acknowledgment under rule, ib.
Of escape:
by being at large, 423.
by refusal of gaoler to show him, ib.
For defendant:
on plea of negligent escape and retaking prisoner, 423.
if prisoner not retaken no force excuses, 424.
but the act of God or the king's enemies, ib.
original debtor a witness in those cases, Digest, 168, pl. 3.
ESTOPPEL,
what, and how taken advantage of in pleading, 39.
by what a party is concluded, 24.
the doctrine at one time applied to witnesses, now otherwise, 176.
EVIDENCE. See *Presumption.*
General rules,
1. affirmative to be proved, 4.
2. must be confined to the issue, 6.
3 the best evidence must be produced, 8.
but not necessary to call more than one witness, ib.
unless in treason and perjury, 9.
when secondary evidence admitted, 22. 33. 66.

EXAMINATION,
Of witness on former trial,
how proved, 63.
by magistrate, 36. See *Depositions*.

EXCISE OFFICER. See *Custom-house Officer*.

EXECUTOR AND ADMINISTRATOR,
1. Actions by, on cause of action arising to testator:
on general issue, plaintiff need not prove probate or letters of administration, 367.
nor will defendant be permitted to show, they do not exist or are void for want of stamp, &c. ib.
aliter, on plea of *ne unques* executor, ib.
2. Actions by, on cause of action arising to themselves:
must prove their whole title, 367.
what evidence of probate and administration, ib.
defendant may controvert the probate, 369.
by showing void stamp, 368.
or *bona notabilia*, ib.
on plea of statute of limitations, plaintiff cannot prove promise to himself without count thereon, ib.
3. Actions against,
Pleas by,
general issue only disputes the debt, 368.
Ne unques executor:
plaintiff must prove defendant executor, ib.
by copy from book in ecclesiastical court, or original will proved by him, 369.
or intermeddling by defendant, ib.
what act will make him executor *de son tort*, ib.
Plene administravit:
Plaintiff's evidence,
What proof of assets,
not an admission of debt and promise to pay as soon as he could, 370.
or submission to arbitration, ib.

EXECUTOR AND ADMINISTRATOR—*continued.*
or payment of interest on bond, 370.
but negligence in not collecting debts is, ib.
inventory exhibited by defendant, ib.
what effects deemed assets, 371.
Defendant's evidence,
what payments allowed, 371.
debts of equal degree, ib.
expences of funeral, 372.
simple contract debts before notice of bond, 371.
how proved, 372.
or bond before judgment not docketted, 371.
how proved, 372.
not interest incurred by laches, 372.
payment over to infant executor, ib.
to rightful administrator, ib.
not to co-executor, 373.
retainer of debt due to himself, ib.
bonds, &c. outstanding, 373.
Judgments against testator:
judgment must be docketted, 371. 373.
failure by defendant as to one bond avoids the whole plea, 374.
penalty taken as the debt, unless replication *per fraudem*, ib.
creditor being ready to take what is really due, supports that replication, ib.
Judgments recovered against himself:
if pleaded to bond must appear to be before notice, 371.
on replication *per fraudem*, defendant must prove consideration of judgment, 374.
Action on *devastavit*:
Plaintiff must prove,
former judgment, execution and sheriff's return, 347.
Defendant may prove,
goods of testator shown to the sheriff, 375.

EXEMPLIFICATION,
of English courts prove themselves, 32. 72.
of foreign courts require further evidence, 70.
EXPLANATION,
of written instruments when admitted. See *Ambiguity*.
EXTORTION,
Action for,
plaintiff may sue sheriff or bailiff, but not both, 418.
evidence against the sheriff, ib.

F.

FACTOR,
is a witness for his principal though directly interested, 160.
FALSE CHARACTER,
action for giving, (evidence to support), 311.
plaintiff must prove the *scienter*, ib.
FALSE RETURN OF FIERI FACIAS,
Evidence,
Plaintiff must prove,
judgment, writ and return, 420.
that defendant had property in county, ib.
notice to sheriff, ib.
from what time goods bound, ib.
how far divested by act of plaintiff, ib.
FALSE RETURN OF MESNE PROCESS,
Action for,
proof of plaintiff's debt, 418.
writ and return, ib.
caption, 419.
refusal to take after notice, ib.
defendant at large after return of writ, ib.
bail put in after the end of the term no defence, 420.
but if before rule to bring in body expires it is, ib.
FATHER, (putative),
not compellable to prove himself so, 178.
but may be examined if he chose, ib.

FEME COVERT,
admissions by, do not bind husband, 91.
answer by, does not bind her, 54.
promise by, does not bind her after his death, 280.
FINE,
How proved,
indentures by the chirograph, proclamation by examined copy, 35.
its effect when levied by tenant for life, 328.
by tenant for years, 329.
by tenant in common, ib.
Entry to avoid,
not necessary when levied by tenant for years, or tenant in common, before ouster, 329.
or when no proclamations made, ib.
or when ejectment commenced before proclamations complete, ib.
within what time to be made in general, 328.
when plaintiff under disability, 332.
in what form, 329.
FISHERY. See *River*.
action for fishing in, 319.
not necessary to prove the actual taking of fish, ib.
mode of fishing in one part of river evidence of right in another part, 204.
FLEET BOOKS,
no evidence in any case, 84.
FOREIGN ATTACHMENT,
evidence of, 80.
FOREIGN COURT,
in actions on its judgments or sentences, they are evidence *primâ facie* only, 68.
but in other cases conclusive, ib.
as in acquittal of crime, 69.
or deciding the validity of marriage contracted there, ib.
or when deciding on the law of nations, ib.
as in the case of capture, ib.

FOREIGN COURT—*continued.*
and our courts cannot look into the evidence on which they decide, ib.
but if it appear that they decided on arbitrary ordinance of their own country, not acknowledged by this, the sentence is void, 69.
so if the court be not regularly established, 70.
how the sentence is to be proved, ib.
Their seals,
how proved, 71.
FOREIGN LAWS,
Unwritten,
must be proved by witnesses, 72.
Written,
must be proved by copies, ib.
FORFEITURE. See *Ejectment.*
FORGERY,
Evidence to prove,
want of similitude of hand-writing, 100.
forgery of other instrument not admissible, ib.
nor witnesses belief from other considerations than the want of similitude, ib.
inspection of other papers by jury, 101.
want of genuiness of hand-writing, by persons not acquainted with that of the individual in question, 102.
who may be witnesses on indictment, 144. Digest 164.
FRAUDS, (Statute of),
provisions of, as to contracts, 221.
extends only to them while unexecuted, 226.
Particular provisions:
1. as to promise to charge an executor, 221.
2. for the debt of another, ib.
What is so considered,
a collateral promise in aid of his credit, 222.
but not a direct promise, whereby party promising becomes the original debtor, 223.

FRAUDS, (Statute of)—*continued.*
nor where there is a new consideration, 223.
as in consideration of landlord not distraining things in possession of defendant, ib.
or of the creditor giving up things on which he had a lien, ib.
or in consideration of withdrawing record in an action of *tort*, 224.
or where there is a moral obligation, ib.
but if the promise be for the debt of another, and also to do something also, no action lies on any part of it, 222.
How long the obligation continues. See *Guarantee.*
3. in consideration of marriage, 221.
does not extend to cases of mutual promises to marry, 224.
but to promises to pay money, &c. 224.
4. for the sale of lands, 221.
extends to sale of growing grass, &c. 224.
but not of potatoes completely grown, ib.
5. an agreement not to be wholly performed within a year, 221.
is not taken out of statute though part performed, 225.
does not extend to contingencies which may or may not happen within that time, ib.
as to pay money when a ship arrives, ib.
or at the death of person promising, ib.
6. on agreement for sale of goods of the value of 10*l.* or upwards, unless part of money paid, or part of goods delivered, 222.
extends to executory contracts, 225.
but not to work to be performed, 226.
What a part delivery,
weighing off goods, 227.
buyer selling part to a third person, ib.
delivery of key of warehouse, ib.

FRAUDS, (Statute of)—*continued.*
transfer of horse from one stable to another, of a man carrying on the distinct business of livery-stable keeper and horse dealer, 227.
but not the mere measuring out corn, which was to be kept by the seller till called for, 228.
note to a third person to deliver them, 227.
delivery of sample after weighing it, ib.
but not of mere sample before sale, which is not intended to be part of thing sold, ib.
As to the form of memorandum. See *Stamps.*
1. what a signature within the statute.
an entry by auctioneer of the sale, 228.
and this whether of lands or goods, ib.
2. what a sufficient memorandum:
a letter from a father saying, he will give his daughter a particular sum for her portion, 228.
his signature as a witness to marriage articles, settling the sum recited to be given by him, ib.
a bill of parcels, "Mr. *A.* bought of *B.*" ib.
a letter from defendant's attorney, promising to pay without mentioning the sum, or the creditor's name, ib.
but not a memorandum of the buyer's clerk, of his having bought without naming the buyer, ib.
or such an entry by the seller's clerk, ib.
or a book, entitled, "Shakespeare's Subscribers, their Names," without reference to any prospectus, ib.
nor a letter from the defendant, stating that the articles were not worth the money, and therefore returning it, ib.
nor the defendant's confession in an answer in Chancery, 226.
nor any writing not stating the consideration of a contract within 4th section, 230.
aliter of contract within 17th section, ib.

FRAUDS, (Statute of)—*continued.*
provision of, as to wills, 378. 382.
See title '*Will.*'

FRAUDULENT ASSIGNMENT,
statute of Elizabeth as to, 413.
what proof required, ib.
when possession necessary, ib.
Twine's case, 414.
cases where possession of grantee is considered as fraudulent, 414, 415.
assignment to creditors for lawful purposes, 417.

FREEHOLD,
Evidence of,
See *Seisin.*

G.

GAME LAWS,
Action on, (See *Statutes*).
title to manor not to be tried in action on, 291.
but plaintiff may show by evidence, that defendant's deputation is without colour of title, ib.

GAOLER,
action against, 411.
See *Escape.*

GAZETTE,
when evidence, 77.

GENERAL ISSUE,
in general, 209.
evidence on *nil debet*, 288.
non assumpsit, 263.
non cepit, 322.
non est factum, 281.
not guilty in case, 302.
in trover, 321.
in trespass, 322.

GOODS, sold and delivered,
Proof of,
by delivery to a carrier, 246.
at the defendant's house, 247.
contract by defendant's wife, when binding, 248.
Value of, not entered into when purchased for a certain sum, 246.
unless in case of fraud, ib.
GRANT,
when presumed, 22. See *Presumption*.
plea of lost grant and proof of, 325.
GUARANTEE,
must be in writing and contain the whole contract, 230. See *Frauds*, statute of,
when continuing and when satisfied, 223.
surety not liable if principal trusted to a larger amount, ib.
evidence against, see *Goss* v. *Watlington*, Addenda.

H.

HAND-WRITING,
how proved, 99.
comparison of hands, what it is, 100.
not admitted in common cases, ib.
aliter in cases of old documents coming from proper custody, 101.
opinions of witnesses as to its authenticity, ib.
when jury permitted to compare papers, ib.
HEARSAY,
distinction between hearsay and reputation, 16
declarations *post litem motam* not admitted, 14.
nor hearsay of particular fact, ib.
Reputation allowed:
in cases of pedigree, 12.
of custom, ib.

HEARSAY—*continued.*
but not of private prescription or right, 17.
cases in this point, Appendix, No. I.
exception when several persons interested, 338.
Declarations of deceased members of family admitted,
to prove marriage, 12.
legitimacy, ib.
birth of child, and time of, 14.
but not as to the place where the birth happened, ib.
declarations of deceased tenant as to who was his landlord, admitted, ib.
of parishioners as to the boundary of parish, 15.
or as to parish modus, ib.
HEIR,
Proof of title by,
seisin of ancestor, 376.
what possession evidence of, 377.
relationship, ib.
not mere reputation of being heir, ib.
posthumous birth, 381.
what evidence sufficient to prove non-access, 380.
Action against, on specialty debt of ancestor,
His pleas,
riens per descent, generally, 406.
plaintiff's evidence thereon, ib.
defendant's evidence, 407.
riens per descent, at commencement of action, 408.
plaintiff's evidence thereon, 409.
HIGHWAY,
action for nuisance in, 314.
in what cases surveyors of highways are witnesses, Digest, 157.
HOUSES OF LORDS AND COMMONS,
copies of the minutes of their judgments evidence, 37.
but their resolutions not evidence of the fact resolved, 53.
HUE AND CRY. See *Hundred.*

HUNDRED,
1. Evidence in action against, on statute of hue and cry, 295.
Plaintiff's evidence:
that robbery was in the day-time, 295.
in an open place, ib.
within hundred, ib.
on a week-day, unless party on his way to church, ib.
Notice to inhabitants of town near,
to constable, 296.
in gazette within twenty days, ib.
what such notice must contain, ib.
oath before justice of peace within same time, 297.
must be taken by person actually robbed, 298.
what such oath must state, 301.
bond given for payment of costs in case of action failing, 298
commencement of action, ib.
plaintiff may himself be a witness when no other person present, 146.
and inhabitants of the hundred for the defendant, ib.
no more than 200*l.* recoverable, unless two persons together at the time of the robbery, 299.
2. Evidence in actions on the riot act as enlarged by stat. 57 Geo. 3, ib.
Plaintiff must prove,
value of property destroyed, 301.
riot either felonious, or amounting to a misdemeanour, ib.
goods or furniture destroyed or stolen at same time, ib.
3. Evidence in actions on other statutes, ib.
HUSBAND AND WIFE,
1. Action by,
when necessary to prove their marriage, 351.

HUSBAND AND WIFE—*continued.*

2. Action against.
cohabitation sufficient proof, 351.
3. Action by husband alone. See *Crim con.*
when necessary to prove marriage, 352.
for harbouring wife, 354.
when wife's representations evidence against husband, ib.
4. When witnesses for or against each other, 169.
neither during marriage or after divorce, 169. 171.
either to criminate or contradict each other, ib.
or for third person jointly indicted, ibid.
but wife may give evidence to exonerate third person, from a debt, though she incidentally charges her husband, 171.
Exception to the rule,
cases of personal violence, 170.
wife *de facto*, and not *de jure*, as second wife on indictment for bigamy, ib.
or forcible abduction, ib.
or wife divorced by act of parliament, to prove facts happening after the divorce, 171.
5. In what cases they may be called to deny their marriage, 177.
on questions of the legitimacy of their children, ib.
so the wife to prove her own adultery, 178.
but not the non-access of her husband, ib.
6. Admissions and representations by wife:
When evidence against husband,
only receivable as part of the *res gesta*, 22.
What considered such:
representations at time of elopement 21.
state of her health, 23.
What not:
representation of by-gone transaction, 21.
acknowledgment of receipt of money earned by her, ib.

HUSBAND AND WIFE—*continued.*
or due to her as executrix, 21.
or from her before marriage, ib.

I.

IDIOT,
cannot be a witness, 127.
who considered such, 393
ILLEGITIMACY. See *Legitimacy.*
IMPLIED PROMISE,
evidence of, 245.
no implication when agreement in writing, 257.
IMPROPRIATION,
may be proved by pope's licence, 87.
INCORPOREAL HEREDITAMENT,
evidence of title to, 315.
INDEMNITY AND CONTRIBUTION,
When the law implies promise of,
in case of joint liability, 250.
or of surety, 251.
When not,
cases of *tort*, 252.
illegal contracts, ib.
INFAMOUS PERSONS. See *Dying Declarations. Witnesses.*
INFANCY,
is evidence on *non assumpsit*, 277.
but not on *non est factum*, 282.
Subsequent ratification:
defendant to show time of birth on replication of subsequent ratification, 277.
bare acknowledgment not a ratification, 278.
nor promise to pay part, 278.
Necessaries:
what considered such, ib.
not things bought to sell, ib.
or money lent, ib.
or account stated, ib.
whether necessaries or not is a mixed question of law and fact, ib.

INFANCY—*continued.*
onus on plaintiff, 278.
and defendant may show provision of friends, 279.
INFORMERS,
when witnesses, 149. Digest.
INFIDEL,
may be a witness, 137.
INFRA QUATUOR MARIA,
explanation of the phrase, 380.
cases upon it as to access, 381.
INHABITANTS OF PARISHES, &c.
when witnesses. See *Parishioners.*
INQUISITIONS,
Public:
evidence of private rights, 82.
Private:
no evidence against third persons, 83.
INROLMENT OF DEEDS,
clerk's indorsement evidence of inrolment, 35.
when inrolment evidence of deed, 35. 108.
INSANITY,
evidence of, 393.
idiot, who so considered, ib.
lunatic or madman, 395,
Lord Thurlow's rule as to, ib.
observations thereon, 396.
INSIMUL COMPUTASSIT,
evidence on, 253.
INSPECTION OF PUBLIC ACCOUNTS,
Of the proceedings of courts of justice:
when granted to the parties interested, 89.
Of public offices:
granted to the parties interested, ib.
but not to strangers, 90.
Of corporation books, &c.
granted to members of corporation when disputing *inter se*, 90.
Of court-rolls of manor:
granted to tenants of the manor when disputing *inter se* or with the lord, 90.

INSPECTION, &c.—*continued.*
but not to strangers disputing with the lord or commoners, 90.
inspection not granted for the purpose of enabling party to maintain criminal prosecution against the members of the public body in possession of the documents, 91.
informations in *quo warranto* not considered so, 92.
INSTITUTION AND INDUCTION,
how proved, 437.
INSTRUMENTS, Private. See *Deeds.*
INSURANCE, Policy of,
evidence in action on, 235.
INTEREST. See *Witness.*
INTERPRETER,
Between attorney and client,
bound to same secrecy as the attorney, 173.
JOINT CONTRACTOR. See *Abatement.*
in actions for a breach of contract, the plaintiff must recover against all or none, 213.
even though he declare in *tort*, ib.
aliter if a *tort* were actually committed by one only, without any fault in the others, ib.
JOINT TRESPASSER,
when a witness for plaintiff, 136. 142.
for defendant, 148.
JOURNALS OF PARLIAMENT,
proved by copies, 53.
the resolutions of either house no evidence of the facts resolved, 53.
ISSUE,
the evidence must be confined to it, 36.
JUDGMENT,
of superior courts must be formally entered before it can be proved, 36.
and the whole copied, ib.

JUDGMENT—*continued.*
but the minutes of the House of Lords sufficient, 36.
so of inferior courts, 73.
How proved:
by an exemplification, 32. 34.
by an examined copy, ib.
For or against whom evidence:
In civil cases,
the party only, 40.
or one privy in estate, ib.
or person under whom he acted, 41.
unless in cases of public rights, 42.
Effect of,
As to personal property,
conclusive as to the right, 37, 38.
As to real property,
conclusive in all actions of equal degree as to the fact directly found, 39.
but not in actions of a higher nature, ib.
nor of facts not directly in issue, ib.
as in mere possessory actions where the general issue only is pleaded, ib.
Qu. whether conclusive on general issue, 37. 48.
In criminal cases,
Conviction,
when and against whom evidence in a civil suit, 42.
never for a party who was examined on an indictment, 46.
only evidence of the fact directly found, 47.
acquittal no evidence, 48.
general observations as to the effect of verdicts, &c. 73.

JUDGMENT—*continued.*
may be shown by third persons to be fraudulently obtained, 74.
of ouster against A. admissible, but not conclusive against B. 76.
conviction of principal does not prevent accessary from proving his innocence, ib.
Of inferior courts:
how proved. *Vide supra.*
cause of action may be shown to have arisen out of jurisdiction, 73.

JUSTICE OF PEACE,
action against, 427.
The statutes:
21 Jac. 1.
7 Jac. 1.
24 Geo. 2.
42 Geo. 3.
} 427.
43 Geo. 3. 429
in what cases notice necessary, 432.
the form of notice, ib.
when malice must be proved, 429.
when conviction a defence, 430. 435.
when proof of commencement of action required, 433.
period of limitation, ib.
case of continuing trespass, ib.
tender of amends and proof thereof, 435.

L.

LANDLORD AND TENANT. See *Assignee. Rent. Use and Occupation.*
In what cases the landlord is a witness to prove the extent of the thing demised, 166.
proof of agreement. See *Use and Occupation. Stamps. Lease.*

LANDLORD AND TENANT—*continued.*
Evidence in action by landlord,
1. In action for mismanagement of farm, 260.
evidence of holding, ib.
of the custom of the country, ib.
when contract governed by it, ib.
2. In action for double the yearly value after notice by landlord, 292.
Plaintiff's evidence:
notice must be in writing, 293.
What notice sufficient,
as to time, 293.
as to person giving notice, 294.
receiver of Court of Chancery, ib.
or agent, ib.
one tenant in common for his moiety, ib.
but not one joint-tenant, ib.
no other demand necessary, ib.
Defendant's evidence:
that he held over under a fair but mistaken notion of title, ib.
3. In Action or distress for double rent after notice by tenant,
the notice need not be in writing, 292.
4. In Ejectment by landlord on determination of lease,
proof of lease. See *Deed.*
5. In Ejectment on notice to quit, 340.
proof of commencement of tenancy, ib.
customary time of quitting, ib.
when writing must be produced, ib.
Notice to quit,
By whom given,
tenant in common for his moiety, 342.
joint-tenant, ib.
agent, ib.
receiver of Court of Chancery, 353.
Service of,
at dwelling-house, 342.
on one of several tenants, ib.

LANDLORD AND TENANT—*continued.*
on original tenant who has underlet, 342.
when there is a subscribing witness, 343.
when rendered unnecessary by disclaimer, ib.
when tenant may dispute landlord's title, 339.
what is proof of subsequent waver, 343.
6. In ejectment on forfeiture of lease,
for non-payment of rent, 345.
in cases within stat. 4 Geo. 2, ib.
not necessary to prove a demand, ib.
in cases not within the statute must prove a demand, 346.
how to be made, ib.
Waver of forfeiture,
by acceptance of rent, &c. 347.
does not avail where the lease is absolutely avoided, &c. ib.
LEADING QUESTION,
Not allowed either on a *vivâ voce* examination or written interrogatory, 65. 183. 195.
when depositions suppressed as leading, 65.
when not, ib.
LEASE,
must be stamped as such, 220. 258.
what instrument is construed to be so, and what an agreement for, 258.
Agreement for,
what instrument considered a lease, and what a mere agreement, 258.
What action a landlord may maintain on the agreement:
use and occupation, 254.
assumpsit for mismanagement of farm, 260.
LEGITIMACY,
Witnesses:
when husband and wife may be witnesses as to. See *Husband and Wife*.
declarations of father or mother after death evidence to prove adulterous connection, 13.

LEGITIMACY—*continued.*
but not to prove non-access, 13.
general evidence of mother's incontinence when received, 382.
general reputation of family evidence, 13.
when access shall be presumed, 380.
when not, 381.
time of gestation a question of fact, not of law, ib.
register not controlled by private memorandum of parson, 84.

LETTERS PATENT,
How proved,
by exemplification, 32.
presumption of, from length of time, 26.

LEX LOCI. See *Reputation.*
judgment between third persons evidence of, 42.
See *Depositions.*

LIBEL. See *Slander.*

LIBERUM TENEMENTUM,
evidence on general issue, 324.
when acts of ownership on one part of a river or land will be evidence of the right to another, 204.

LIFE,
the continuance of, in general presumed, 6. 408.
aliter, where such presumption would imply a crime, as that a first husband was living at the time of a second marriage, 5. 408.

LIGHTS,
action for obstructing, 315.
What evidence of right sufficient,
twenty years undisturbed possession, 315.
enjoyment by stranger who conveyed to both parties, 316.
but the plaintiff cannot claim lights for larger purpose than accustomed, ib.

LIMITATION OF ACTIONS,
not evidence on *nil debet*, 283.

LIMITATION OF ACTIONS—*continued.*
In contract:
What within the statute,
a long unsettled account on one side, 271.
but not mutual accounts, ib.
What revived by subsequent promise:
not cases of negligence, 271, 272.
or breach of warranty, 271.
but debts on executed contracts are, 272.
What acknowledgment sufficient:
various instances, 272, 273.
by one of several debtors, 273.
Special replication:
writ sued out, 274.
continuance thereof, ib.
disability of plaintiff or defendant, 275.
what disability sufficient, 332.
LIS MOTA:
declarations made after, on the point in dispute, not receivable, 14.
nor depositions, ib.
aliter if on another point.
LOG BOOK. See *Books.*
LOSS OF A WRITTEN INSTRUMENT,
what sufficient proof of to enable a party to give evidence of contents, 94.
LUNACY,
how proved, 393.
when the *onus* lies on the party alleging a lucid interval, 395.
LUNATIC,
when a witness, 127.

M.

MAHOMEDAN,
may be a witness, 137.
MALICIOUS ARREST,
action for, 310.
Plaintiff must prove,
affidavit of debt, 310.

MALICIOUS ARREST—*continued.*
writ and return, 310.
sheriff's warrant in some cases, ib.
cause ended by record, or rule of court, ib.
order of judge not sufficient, ib.
nor order of chancellor for supersedeas, 311.
want of probable cause, ib.
this not inferred from result of a reference, ib.

MALICIOUS PROSECUTION,
action for, 309.
Plaintiff must prove,
prosecution ended by copies of proceedings, 309.
or production of original record, ib.
that defendant was the prosecutor, ib.
grand juror may prove this, ib.
want of probable cause, ib.
this not inferred from his abandoning the prosecution, ib.
how far the defendant's information will be considered as true, ib.

MANOR,
evidence of custom, &c. See *Copyholder. Custom.*
when the custom of one manor will be evidence of that of another, 204.

MAP,
no evidence against third Persons, 87.
aliter between two persons each claiming under person making, ib.

MARKET,
twenty years peaceable possession evidence of the right, 315.
twenty years *non user* by plaintiff, and enjoyment by defendant or another, evidence against right, 317.

MARRIAGE,
evidence of, as against the parties, 25.
against strangers, 92. 299.
How proved;
by register, 84.

MARRIAGE—*continued.*
what considered so, 84.
by reputation, 13.
MASTER,
proof in action for seducing servant or apprentice, 355.
MEMORANDUM,
Of deceased persons,
when evidence, 14 to 19. See *Entries.*
MEMORY,
when witness may refresh, by referring to memorandum, 195.
MESNE PROFITS,
recovery of in ejectment, 344.
action for, 349.
MINISTER's RETURN,
evidence without proving the commission, 37.
its effect. See *Modus.*
MODUS,
Evidence in cases of:
in general, and the effect of ancient documents, 444.
when evidence of custom of A. admissible to show custom of B. 204.
For the parson:
entry by the incumbent or his collector of receipt of tithes, 15.
by lessee, ib.
terrier signed by churchwardens or parishioners, 86.
provided it comes out of proper custody, ib.
the register of dean and chapter of Litchfield proper custody as against one of the prebendaries, ib.
but not the chest of college as against the parson, ib.
nor the British Museum or Bodleian Library, ib.
For the land-owner:
declarations of deceased land-owners as to the existence of a parochial modus, 15.

MODUS—*continued.*
entry by steward of land-owner of payment of particular modus, 16.
terrier, though not signed by the parson, 87.
receipt by former incumbent, 101.
what evidence required of hand-writing in such cases, ib.

MONEY HAD AND RECEIVED. See *Vendor and Vendee. Warranty.*
sheriff's return of levy no proof of payment to defendant, 51.
money recovered under legal proceedings cannot be recovered back, 37.

MONEY PAID INTO COURT. See *Payment of Money, &c.*

MONEY PAID TO THE USE OF THE DEFENDANT,
evidence in action for, 249.
that it was paid at defendant's request, ib.
or in consequence of obligation, 250.
plaintiff must prove actual payment of money, ib.
not maintainable by one joint trespasser or *tort-feasor*, 252.
or person sustaining a loss on joint gambling account, ib.

MONEY LENT. See *Indemnity.*
action for, 312.
payment of banker's check no proof of, 253.

MORTGAGEE,
evidence in ejectment by, 347.

N.

NAVY OFFICE,
its books, when evidence, 78.

NEGLIGENCE,
action for, 312.

NEGLIGENCE—*continued.*
For keeping a mischievous animal:
in cases of domestic animals, plaintiff must prove defendant's knowledge of his mischievous disposition, 313.
but this is not necessary when noxious animal is kept, ib.
for nuisance in obstructing highway, 314.
for running against carriage or ship, ib.
defendant liable for negligence, not wilful misconduct of servant, 315.
NEW ASSIGNMENT,
when necessary, and evidence upon it, 326.
NEW TRIAL,
when granted, 3. 182.
NIL DEBET,
When pleadable:
to action on simple contract, 288.
or where specialty only inducement, ib.
so to debt for penalty, 289.
Evidence on:
debt satisfied, 288.
not the statute of limitations in action for a debt, ib.
aliter in actions on statutes, 290.
NON ASSUMPSIT,
Plea of:
puts all the facts in issue, and enables the defendant to prove payment or any other fact which shows that the plaintiff has no cause of action, 263.
but tender, set off, &c. which admit the action, must be pleaded, 270.
NON CEPIT,
what it puts in issue, 322.
NON EST FACTUM,
What is evidence on:
coverture at time of making deed, 282.
defendant blind or illiterate, ib.

NON EST FACTUM—*continued.*
deed falsely read, 282.
defendant lunatic or drunk, ib.
deed altered by plaintiff after execution, ib.
or by another person in material part, ib.
seal broken off, *animo cancellandi*, before plea pleaded, ib.
aliter if done since, ib.
What not;
usurious consideration, 282.
infancy, ib.
duress, ib.
the falsehood of any other fact in the declaration, ib.
NON RESIDENCE,
action for, 449.
Statutes:
21 Hen. 8.
25 Hen. 8.
28 Hen. 8.
33 Hen. 8.
} 449.
43 Geo. 3. 450.
57 Geo. 3. ib.
Provisions of last statute:
time of absence, 450. 452.
who within it, 451.
place of residence, 451, 452.
keeping in repair, 453.
licence of absence, ib.
notice of action, 454.
payment of money into court, ib.
proof of benefice, ib.
of absence, 455.
value of living, ib.
of licence to absent, ib.
exception, 456.
NOTARY PUBLIC,
His seal,
evidence to prove presentment of foreign bill, 73.

NOT GUILTY,
When pleadable,
to penal statute, 289.
In case,
puts the whole declaration in issue, 302.
In trespass,
pound-keeper may justify detention on, 324.
so defendant may show *liberum tenementum*, ib.

NOTICE OF ACTION,
when necessary, 455.

NOTICE TO PRODUCE PAPERS,
when necessary, 94. 103.
not necessary to produce a former notice, 104.
or other papers whereof a duplicate is kept, ib.
or document for which the action is brought, ib.
To whom it may be given:
to the party or his attorney, 103.
either in a criminal or civil proceeding, ib.
and this is sufficient to enable the party, giving the notice, to give evidence of a document relating to the estate formerly in the hands of the person conveying to the party to whom notice is given, 103, 104.
Instruments produced under notice:
if the party producing is no party to them, must be proved by the subscribing witness, 105.
aliter, if he is a party or claims under the deed, 106.

NOTICE TO QUIT. See *Landlord and Tenant*.
if signed in presence of subscribing witness, he must be called, 95.
notice must be given to produce it, if no duplicate kept, 104.

NUISANCE,
evidence in action for, 315.

NUL TIEL RECORD,
proof on issue of, 32.

O.

OATH,
form of administering, 139.
if witness says he considers it binding as administered, not to be asked if he considers any other form more so, 140.
opinions of the judges in the Queen's case as to this point, ib.
OFFICE COPIES,
when evidence, 35.
OFFICERS OF JUSTICE,
evidence in actions against, 411. See *Constable. Custom House Officer. Justice.*
of the notice required, 430.
ONUS PROBANDI,
on whom it lies, 4.
OPINION. See *Hand-writing.*
when evidence as to matters of science, 101. 195.
ORIGINAL,
what entry considered such, so as to make a copy evidence, 87.
OUSTER, ACTUAL,
fine of tenant in common does not bar without, 329.
what facts amount to proof of, 331. 334.
OUSTER, JUDGMENT OF,
not conclusive against third person deriving title under the person ousted, 76.

P.

PARCEL OR NO PARCEL,
declaration of tenant admitted to prove, 14.
PARDON,
when it restores competency, 131.
how proved, ib.
PARENT,
evidence in action for seducing daughter or assaulting child, 355. See *Seduction.*

PARISHIONERS,
When witnesses:
in all cases relating to offences committed against highway or turnpike acts, 157.
in cases of penalties not exceeding 20*l.* ib.
in questions relating to boundary, ib.
or settlement of pauper, ib.
or concerning bastards, ib.
in actions for money spent by churchwardens, ib.

PARISH REGISTERS,
evidence of, and their effect, 83.
not controlled by memorandum of clergyman, 84.

PARLIAMENT,
Journals of,
How proved:
by examined copies, 52.
which require no stamp, 34.
Effect of their resolutions:
do not prove the fact resolved, 52, 53.
(*sed vide* tit. *Proclamation*).
but recital in act of parliament does, 78.

PAROL EVIDENCE,
when admitted to explain written, 111. See *Ambiguity*.

PARSON,
evidence in ejectment by, 440.

PARTICEPS CRIMINIS,
when a witness for prosecutor or plaintiff, 136. 142.
when for defendant, 148.

PARTICULARS OF DEMAND,
Order for:
its effect, 208.
the particulars must be truely stated, ib.
on particulars, merely stating promissory note, plaintiff cannot go into consideration if the note fail, ib.
but may recover interest if he prove the note, ib.

PARTICULARS OF DEMAND—*continued.*
Particular for horses sold to the defendant:
plaintiff cannot prove money received for horses sold by defendant for plaintiff, 208.
but time of work done not material, if it does not mislead, ib.
if particular wrong, plaintiff cannot set it right by notice without judge's order, ib.
PARTNER. See *Account stated.*
admissions by, evidence, 54.
so is his answer, ib.
not a witness for his partner, 150.
when he may be rendered competent by release, ib.
Vide Digest, 166, pl. 4. 167, pl. 5.
notice to one is so to the other, 234.
one may maintain an action against the other for the share of goods brought into partnership, 250.
or on account liquidated, 253.
but not on an open account, unless on express covenant, 250.
PATENT, LETTERS,
proved by exemplification, 32.
presumed from length of time, 26.
PAYMENT,
Presumption of,
from payment of subsequent demand, 28.
from workmen being periodically paid, 266.
from length of time, 28. 266.
Rebutted,
by payment of interest, 29.
but not by defendant's poverty, ib.
Actual proof of,
to servant, 266.
to broker, ib.
to attorney, 267.
by bill of exchange, ib.
cash notes, ib.
check on banker, 268.
remittance by post, 267.

PAYMENT—*continued.*
Application of,
the debtor may direct it, 268.
but if he does not the creditor may, ib.
unless where debtor indebted in two characters, the one individually, and the other as representing a third person, 269.
or the debtor having ceased to be a trader would remain subject to bankrupt laws if the first debt remained unsatisfied, ib.
or the interests of third persons affected, ib.
Pleas of,
ad diem, 287.
payment of interest after is an answer, 288
post diem, ib.

PAYMENT OF MONEY INTO COURT,
its effect as an admission, 209.
is in general an admission of the cause of action laid, ib.
as the making of bill of exchange on which action brought, 210.
so in action against a carrier admits the promise, but not the defendant's liability beyond the sum paid in, ib.
(Cases of *Yate* v. *Willan*, and *Gray* v. *Marsden*, 210.)
so in an action on policy only admits liability to extent of money paid in, 211.
admits only a legal demand, and does not preclude defendant from showing that other part of the demand is illegal, ib.
production of rule by defendant does not entitle plaintiff to reply, 5. 211.

PEDIGREE,
may be proved by reputation, 12.
but not the place of birth, ib.

PEER,
must be sworn when giving evidence, 11.

PERJURY,
two witnesses required to prove, 39.
proof of defendant's oath to answer, 55. 57.
PEW,
evidence in action for disturbance in, 315.
PHYSICIAN. See *Confidence.*
when a witness, 178.
PLEADINGS,
in general, as governing the evidence. See *Variance.*
PLEAS. See *General Issue. Nil debet; &c.*
PLENE ADMINISTRAVIT. See *Executor and Administrator.*
POLICY. See *Insurance.*
POPE'S LICENCE,
evidence of impropriation, 87.
BULL,
evidence of lands belonging to monastery, 88. 445.
PORTS,
survey of, evidence, 82.
POSSESSION,
when evidence of title and *e contra*, 25. 291. 376.
See *Seisin.*
POSTEA,
no evidence of fact found by verdict, 49.
unless in issue from Chancery, 50.
sufficient proof of trial to let in evidence of witness examined, ib.
POST HORSE ACT,
evidence in action on, 25.
POUND KEEPER,
may justify detention on general issue in trespass, 324.
PRACTICE. See *Witness.*
order of producing evidence, and of counsel's observations thereon, 5.
PRESCRIPTION,
how proved, 17. 325.
reputation not admissible, 17.
See cases collected, Appendix, No. 1.
owner of inheritance not a witness on question of general liability, 160.

PRESENTATION TO A LIVING,
how proved, 437.
PRESUMPTION. See *Rules.*
Evidence to raise,
from acts of party. See *Admission.*
Of deeds or other instruments,
From length of possession,
grant from crown presumed, 22.
conveyance of tithes, ib.
enfranchisement of lands, ib.
mode of enjoying copyhold, 27.
assignment of lease where only lease itself produced, 28.
or *vice versâ*, ib.
of payment. See *Payment.*
Lost deeds,
from recitals in other deeds, &c. See *Deeds.*
from enrolments, 35. 108.
Of execution of deeds,
after thirty years, 106.
Of payment,
from length of time, 28.
from other subsequent payment, ib.
from usual course of paying workmen, 266.
Rebutted,
By payment of interest,
How this fact proved,
by endorsement made by plaintiff before time of presumption, 29.
aliter if afterwards, ib.
Presumption rebutted,
by parol evidence in case of written instruments, 119.
presumption in favour of next of kin, 119.
in favour of conusor of fine, ib.
of revocation of will by subsequent marriage, 120. 402.
PRINCIPAL,
judgment against, evidence against accessary, 76.
but not conclusive, ib.

PROBATE OF WILL. See *Executor. Ecclesiastical Court.*
evidence in case of personal property, 67.
aliter in will of land, 68.
against all persons for civil purposes, ib.
aliter in criminal prosecution, 76.
may be shown to be void for want of proper stamp, 368.
or *bona notabilia*, ib.
PROCLAMATION,
how proved, 77.
evidence of general acts of disturbance stated in it, ib.
PRODUCTION OF PAPERS,
when a party obliged to produce papers, 105.
See *Notice.*
PROFERT,
when made, the deed must be produced, 280.
exception in case of deeds enrolled, 108. 280.
PROMISSORY NOTE. See *Bill of Exchange.*
PROTEST,
evidence to prove presentment of foreign bill, 71.

Q.

QUAKERS,
when witnesses, 140.
QUANTUM MERUIT,
evidence of, 245.
not the usual but reasonable charges of a particular business, 246.
When it may be entered into:
not where a sum agreed upon, 246.
unless in cases of fraud, ib.
when commodities do not answer representation, or work badly performed, *Qu.* 263.
the cases on the subject, 264.
QUARE IMPEDIT,
Action of,
proof of title by plaintiff, 437.
by defendant, 438.
of avoidance, ib.
how far the proof must agree with the pleading, ib.

QUARE IMPEDIT—*continued.*
evidence of augmentation under queen Anne's bounty, 439.
proof of dispensation, ib.
finding of the jury, ib.
QUARTER SESSIONS, Minutes of. See *Books.*
QUEEN ANNE'S BOUNTY,
Augmentation by,
how proved, 439.
QUO WARRANTO,
Judgment of ouster,
when evidence against third persons, 76.
when corporators may be witnesses, 169.

R.

RECITAL,
when evidence of deed recited, 107.
RECORD,
How proved,
by exemplification, 32. 34.
examined copy, 32.
proof of, 34.
office copy, ib.
Secondary evidence admitted:
on proof of loss or destruction, 33.
presumed from length of possession, 22.
The whole to be copied, 36.
Exception to this rule:
matter of public concern relating to different subjects, 36.
When evidence received to explain:
to show it improperly obtained, 31.
but not to show it erroneous, ib.
against whom evidence. See *Judgment.*
RECOVERY,
may be presumed, 27.
statute as to proof of, ib.
RECTORY,
Grant of,
when presumed, 26.

REGISTER. See *Fleet Books. Books.*
of birth, marriage, &c. 83.
not contradicted by memorandum of clergyman, 84.
REGISTER OF SHIP,
no evidence against person not making it, 78.
nor for person making it, ib.
RELEASE, GENERAL,
how far open to explanation, 110.
may be presumed after great length of time, 28.
but not in case of quit rent, ib.
RELIGION. See *Witness.*
REMAINDER-MAN,
may avail himself of verdict found for tenant for life, 41.
or of an actual entry made by him, 328.
or may enter for him, ib.
cannot avoid a fine by ejecment, but must bring *formedon*, ib.
RENEWAL,
Covenant for, in lease,
not to be explained by parties acts under similar covenants in other leases, 123.
RENT. See *Use and Occupation.*
action for double. See *Landlord and Tenant.*
REPLEVIN,
evidence in action of, 322.
in action for not taking sufficient sureties in, 424.
who liable, 425.
plaintiff's evidence, ib.
extent of defendant's liability, ib.
REPLY, GENERAL,
party making affirmative entitled to, 5.
rule to pay money into court does not entitle plaintiff to it, ib.
REPUTATION. See *Hearsay.*
distinction between reputation and hearsay, 16.
mere hearsay, *post litem motam*, not admitted, 14.
hearsay of a particular fact rejected, 16.

REPUTATION—*continued.*
admitted in cases of pedigree, 13.
of custom, 15.
but not of private prescription or right, 17.
See Cases collected, Appendix, No. 1.
Exception to this rule,
when several persons interested, 218.
RES INTER ALIOS ACTA,
When evidence,
See *Answer. Copyholder. Custom. Judgment. Lex Loci. Remainder-man.*
RETURN OF WRITS,
when evidence and to what extent, 50.
of rescue not traversable between parties, ib.
or that sheriff had not sold at request of plaintiff, 51.
but does not prove more than directly stated, ib.
as that plaintiff had received the money levied on *fi. fa.* ib.
REWARDS,
On conviction of offenders,
does not disqualify witnesses, 148.
RIOT ACT. See *Hundred.*
RIVER,
the general right of fishing in one part may be evidence of the right of fishing in another, 204.
Right of fishing:
navigable, is *primâ facie* open to the public, 319.
not navigable, in the owners of lands on each side, ib.
but both these presumptions may be rebutted by usage, ib.
ROLLS OF COURT BARON,
how proved, and when evidence, 85.
See *Copyhold. Custom.*
RULE OF COURT,
proved by the production, 36.
to bring back venue, effect of, 207. See *Venue.*
to pay money into court, effect of, 209. See *Payment of Money into Court.*

RULE OF COURT—*continued.*
production of, by defendant, does not entitle plaintiff to reply, 5.

S.

SCIENTER,
When necessary to be proved,
in action of deceit in giving character, 311.
aliter in action on express warranty, 201.
in actions for negligently keeping domestic animals, 312.
aliter in action for keeping wild beasts, ib.
so for seducing or harbouring apprentice or servant, 355.
aliter in action for assaulting servant or debauching daughter, ib.
SEALS,
of superior courts prove themselves, 32. 34.
so of foreign states, 71.
not so of inferior or foreign courts, ib.
SEDUCTION,
Of daughter or servant,
Action for,
by parent or master, 354.
evidence of service, 355.
age of servant immaterial, ib.
to what extent the daughter a witness, ib.
Evidence for defendant,
loose conduct of girl, or improper conduct of plaintiff, 355.
Of hired servant or apprentice,
evidence in action for, ib.
SEISIN,
possession or receipt of rent *primâ facie* evidence of, 377.
but not when there is a subsequent long possession contrary to the course of descent, ib.
SENTENCE OF FOREIGN COURTS.
when evidence. See *Foreign Court.*

SERVANTS. See *Admissions.*
when witnesses for their master. See Digest of Cases, 160.
Contract by,
when it charges the master, 245.
Injury by,
master not liable unless servant about his business, 315.
or for wilful act of servant, ib.
witness against master to prove him liable for goods ordered by himself, 161.
but not to dispute negligence imputed to himself till released, ib.
witness in action by master for ill usage of himself, 162.
so it seems on information for servant's misconduct, ib. See Digest of Cases, *ut supra.*

SET OFF,
Plea of,
when necessary, 271.
what demand may be, ib.

SHERIFF. See *Bailiff. Escape. Extortion. False Return. Replevin.*
Plaintiff's evidence in action against,
for seizing wrong person's goods, 412.
warrant to bailiff, ib.
in what cases proved without production, ib.
how far liable for the acts of his bailiff, ib.
Defendant's evidence:
fraudulent assignment by third person. See *Fraudulent Assignment.*
action against, for selling without paying landlord's rent, 425.
Plaintiff's evidence:
demise, 426.
levy by sheriff, ib.
notice to him, ib.
to what rent entitled, ib.
what execution within the statute, ib.
overhauled by commission of bankrupt, ib.

SHIP,
evidence of property in, 78.
when register is so, ib.
entries of transfer at the Custom-house, no evidence against a person not himself making it, ib.
nor for person making it without possession, ib.
in actions for running down, 315.
Who witnesses:
master to prove liability of owner, 161.
but not to prove negligence imputed to himself, ib.
SLANDER,
evidence in action for, 300.
The plaintiff must prove,
his profession as averred, 303.
unless clearly implied by the slander itself, ib.
words as laid in the declaration, ib.
other words may be proved to show the malice, 304.
special damage if the gist of action, ib.
and that such special damage was the natural and legal consequence of the slander, ib.
special damage laid as aggravation, need not be proved if words themselves actionable, 304.
Publication of libel,
by sale in defendant's shop, 304.
or by proprietors of newspapers, as provided by stat. 38 Geo. 3, ib.
the several clauses stated, ib.
construction thereof, 306.
libel in foreign language by translation, 307.
Defendant on general issue may read the whole libel, ib.
or prove ignorance of contents of paper, ib.
that it is a true report of a legal proceeding, ib.
or copy of report of a committee of the House of Commons, ib.
or notification of court martial or military court of inquiry, ib.
that words were spoken by defendant in parliament, 308.

SLANDER—*continued.*
but this no defence to the publication of such words, 308.
bonâ fide character given to a servant, 307.
or opinion of a tradesman's circumstances, ib.
or confidential communication to person jointly interested with himself, ib.
but this must be a fair and not a malicious representation, ib.
circumstances of suspicion of plaintiff's general character in mitigation, 308.
or that he libelled the defendant, ib.
On a plea of justification:
the truth of the words or libel, ib.
SOLICITOR. See *Attorney.*
SOLVIT AD DIEM,
evidence on plea of, 288.
STAMP DUTIES. See *Lease*, (Agreement for).
on agreements, 214.
for what purpose an agreement may be read without stamp, 215.
no parol evidence of unstamped agreement though destroyed, 94.
but party ordered to produce it at the stamp office, ib.
Exceptions thereto:
1. agreement for lease under 5*l.* 215.
2. for hire of labourers, ib.
3. for sale of goods, ib.
extends to all contracts relating to, though by third persons, 217.
but not to things to be made, 218.
or growing on land, ib.
4. for matter not exceeding 20*l.*
several lots at an auction amounting together to above 20*l.* but individually to less, within the exception, 218.
5. letters passing by post, 216.
what considered as such, 218.

STAMP DUTIES—*continued.*

6. agreement for insurance by certain companies, 216.
7. between master and mariners of coasting vessel, ib.

What is an agreement within the acts of parliament:
paper signed by several, each agreeing for himself with a third person, is several agreements, 218.
and requires several stamps to bind several parties, ib.
but one stamp sufficient for one, ib.
so paper signed by one person containing several contracts, ib.
but paper signed by several for one purpose, is but one agreement, ib.
certificate signed by auctioneer of party having purchased, is an agreement by his employer, 220.
but such certificate not signed is not an agreement, ib.
how far one stamp will do for another of equal value, ib.
on what terms stamp of another denomination may be exchanged for the right one, 221.

What alteration makes a new stamp necessary:
not where it is merely to express the original intention of the parties, 219.
aliter when a new term added, ib.
or an instrument is altered after being in complete operation, ib.

On promissory notes and bills of exchange:
when and on what terms a proper stamp may be impressed in lieu of another, 231.
a bill or note made since stat. 37 Geo. 3, on a stamp of greater value though of different denomination from that required, is good, ib.

On probate and letters of administration:
cannot be questioned on general issue to action by executor, 367.
aliter where by form of pleading plaintiff must produce them, 368.

STAMP DUTIES—*continued.*
On awards:
not required to the appointment of an umpire, 71.
STATUTES,
distinction between public and private, 30.
how proved, ib.
Actions on,
1. penal, 289.
Plaintiff's evidence:
plaintiff must prove the act constituting the offence, 289.
must show writ sued out in time, 291.
but common writ sufficient, ib.
When declaration not filed within a year:
writ must be returned, ib.
so if *alias* served, ib.
Defendant's evidence:
that he is within exception or qualification, 289.
reasonable colour of right, 291.
but not merely pretended, ib.
qualification by estate, ib.
former conviction, 292.
2. remedial, ib.
for double rent and yearly value. See *Landlord and Tenant.*
against the hundred, on statute hue and cry, riot, &c. See *Hundred.*
STATUTE MERCHANT,
evidence in ejectment on, 348.
STOCK,
evidence in action on sale of. See *Vendor and Vendee.*
Evidence in action on loan of,
plaintiff's possession of stock, 244.
sale at request of defendant, ib.
loss by omission to replace, ib.
how estimated, 245.

SUBPŒNA DUCES TECUM. See *Deed and Notice to produce.*

SUBSCRIBING WITNESS,
when his attendance dispened with, 95, 96. See *Deed.*
not necessary to validity of deed, 96.
evidence when he denies his hand-writing, ib.
in general must be called, 95.
if dead, absent in foreign country or insane, his hand-writing must be proved, 97.
so if become incompetent by reason of crime or interest, 98.
if a fictitious name put as a subscribing witness, or he, on being called, deny having seen the deed signed, the hand-writing of the party may be proved by another person, 96.
so if witness was interested at the time of attestation, ib.
if more witnesses than one, death or absence, &c. of all should be proved before the secondary evidence is admitted, 99.

SUGGESTION OF BREACHES. See *Damages.*

SURETY. See *Guarantee.*
Evidence in action by,
for indemnity against his principal, 251.
for contribution from co-surety, ib.
when several sureties may join, and when they must sue separately, 252.
Evidence in action against,
see *Goss* v. *Watlington*, Addenda.

SURRENDER OF TERM,
when presumed, 337.

SURVEY, Public. See *Doomsday. Inquisition. Ports. Terrier.*
evidence to prove private rights, 82.
though commission lost, 83.

T.

TENANT. See *Landlord and Tenant.*
cannot be a witness to support his landlord's title, 152.

TENANT IN COMMON,
evidence in action by, for double rent, 292.
of trover, 321.
of ejectment, 334.
fine levied by, before ouster, no bar, 329.
what is evidence of ouster, 331. 334.

TENDER,
Plea of,
is an admission of the plaintiff's right of action, and prevents the necessity of proof, 211. 275.
not pleadable after day of payment of bill of exchange, 276.
Evidence on plea of,
what offer of money amounts to, 275.
to plaintiff's attorney or his agent, ib.
of bank-notes, 276.
country ditto, ib.
Special replication:
Subsequent demand,
by attorney's clerk not sufficient, 277.
writ sued out before bill filed, ib.

TERM. See *Surrender*.

TERRIER,
when evidence, 86.
to be kept in the bishop's register, ib.
or church chest, ib.
coming from other custody not evidence against parson, ib.
aliter against public body who had possession of it, 87.
should be signed by churchwardens, ib.
Chief Baron Richards's observations on its effect, 444.

TITHES. See *Endowment*. *Impropriation*. *Modus*.
evidence in action on composition for, 440.
for not setting out, 441.
what notice necessary to discharge composition, 442.

TITHES—*continued.*
Proof of plaintiff's title;
when possession of rectory, or receipt of tithes, sufficient, 441.
when proof required of title, ib.
in the case of lay impropriator, 443.
when grant or conveyance presumed, 26. 443.
Evidence of discharge from,
by modus. See *Modus.*
the pope's bull, 88. 445.
prescription, 445.
real composition, ib.
order, 446.
unity of possession, ib.
barrenness of the land, 447.
in what cases the custom of tithing in A. will be evidence of like custom in B. 204.

TITLE,
Admission of,
what amounts to, 25.
in what cases former vendor a witness to prove, 166.

TREASON,
two witnesses required in cases of high treason, 10.
so of petty treason, ib.
but in cases respecting the coin, one witness is sufficient, 11.
so in cases of direct attempt against the king's person or life, ib.

TRESPASS. See *Not Guilty.*
Proof of trespass,
meddling by defendant, 323.
or abetting others though he does not personally assist, ib.
day not material, ib.
but plaintiff in some cases confined to one, ib.
Alia enormia:
what facts evidence under it, 323.

TROVER,
Evidence in action of:
Plaintiff must prove,
1. Property:
either special, coupled, with actual possession, 320.
or general, and right to immediate possession, ib.
cannot maintain action if he has bailed to another who has an interest, ib.
aliter if such person has no permanent interest, ib.
as in case of letting to married woman, ib.
mere possession sufficient title against a stranger, 321.
2. Conversion:
actual, what is, 321.
implied after refusal by defendant, when, ib.
not on refusal of mere servant, ib.
or if defendant has a lien, ib.
but lien cannot be set up by person who has claimed as his own, ib.
not if lost by carrier, 322.
3. Against whom it lies:
not by one tenant in common against another, ib.
unless he actually destroyed the goods, ib.
4. By whom:
on general issue, one tenant in common may recover a moiety of value against third person, ib.

V.

VARIANCE,
1. In circumstances, 200.
affects the action unless the avermen wholly impertinent, ib.
of which nature is the statement of a *scienter* in an action on an express warranty, 201.

VARIANCE—*continued.*

but if merely immaterial, it is fatal, 200.

as the mis-stating the days of paying rent in an action against the sheriff for removing goods without paying the landlord, 202.

records must in general be truly stated, ib.

but the substance is sufficient, ib.

contracts must be truly stated, 203.

so must customs or prescriptions, 204.

therefore the custom of tithing in one parish is no evidence on plea of custom in that adjoining, ib.

aliter if it were pleaded as the custom of a district including both parishes, ib.

so the custom of one manor in general no evidence of the custom of that adjoining, ib.

aliter in the case of a general usage governing all manors within a certain district, ib.

so the general mode of fishing on a particular river is proof of the right in a particular part, ib.

so the exercise of right on distant parts of one large waste, ib.

or cutting down timber on different parts of one large plantation, ib.

or the conduct of several persons, assembled on one common purpose, on a justification for arresting plaintiff, ib.

when a *videlicet* will prevent the necessity of a strict statement, 203.

2. Variance in place:

distinction between local and transitory actions, 205.

county immaterial in the latter, ib.

place within it immaterial in both, unless necessary part of description, ib.

instances, 205, 206. See *Venue.*

VENDOR OF LANDS,
Evidence in action by,
Plaintiff's evidence:
contract must be in writing, 221; and see *Frauds*, (Statute of.)
proof of it by subscribing witness or otherwise. See *Deed*.
Other evidence:
abstract of title, 237.
tender of conveyance, ib.
general observations as to what act each party must do, 240.
production of title deeds, 237.
proof of title, 238.
Defendant's evidence:
defect of title, 237, 238.
of one of two lots, sold at same time, ib.
equitable objection, 238.
fraud of plaintiff,
employment of puffers, 238.

VENDOR OF GOODS,
evidence in action by. See the above, and title *Frauds*, (Statute of).
delivery or tender of goods, 237.
readiness of plaintiff to deliver them when defendant was to fetch them, ib.
fall in the value of goods, 339.

VENDEE OF LANDS OR GOODS,
evidence in action by. See the above.
readiness to accept and pay purchase-money, 239.
necessity of readiness not waved by delivery of part without payment, 241.
Tender of conveyance:
not necessary if seller refuses to deliver abstract, or delivers one showing no title, 239.
rise in value of goods, ib.

VENDEE OF LANDS OR GOODS – *continued.*
When he may rescind contract:
not when he has taken possession, or made alterations, 239.

VENDOR OF STOCK,
Evidence in action by,
plaintiff's possession of stock, 243.
attendance to transfer, 244.
subsequent sale, ib.
difference of price, ib.

VENDEE OF STOCK,
Evidence in action by,
defendant's possession, 244.
plaintiff's offer to receive, ib.
subsequent purchase, ib.
difference of price, ib.

VENUE,
place laid merely as such not material, 206.
Undertaking to give material evidence:
what a compliance with, 206.
any one material piece of evidence, ib.
deed enrolled in Middlesex, 207.
commission of bankruptcy tested there, ib.
rule for paying money into court, ib.
or that cause of action arose abroad, or in two different counties, *sed quære*, ib.
but not a demand subsequent to a plea of tender, ib.
or that the witnesses reside in the county, 208.

VERDICT. See *Judgment. Postea.*
in general not evidence till judgment entered, 49.
Exceptions to this rule:
issue from Chancery, 50.
to show the fact of trial, ib.

VOIR DIRE,
examination of witness on, 182.

U.

UNDER-SHERIFF,
His admissions evidence against his principal only when part of the *res gesta*, 22.
When personally liable:
for extortion, if actually taken by himself, 418.
for not taking sufficient sureties in replevin, 425.

USE AND OCCUPATION,
evidence in action for, 254.
defendant's occupation, 255.
under plaintiff's permission, ib.
proved by payment of rent, ib.
though under distress, ib.
value of premises, 259.
or an agreement for lease, 254.
a stranger cannot maintain it, 255.
but grantee of reversion may, 256.
if agreement in writing, it must be produced, 257.
seller who cannot make a good title cannot maintain it against purchaser who has not a beneficial occupation, 256.
occupation by under-tenant is an occupation by lessee, 255.
assignee not liable for antecedent possession of lessee, ib.
when bankrupt continues liable, ib.
tenant cannot dispute his landlord's original title, 25. 259.
or defeat his action by showing that he had demised to another, ib.
but may show title expired, ib.
or subsequent mortgage, ib.
or delivery up of possession, ib.

W.

WARRANT, (Sheriff's.)
proof of, 412.
in what cases secondary evidence admitted, ib.
WARRANTY,
Evidence in action on:
representation at the time of thing sold, 241.
scienter not necessary when positive assurance, nor need be proved though stated, 242.
aliter where thing necessarily out of knowledge of party, ib.
as the age of a horse sold by pedigree, ib.
or the genuineness of very ancient picture, ib.
in what cases a fraudulent concealment, without positive promise, will give cause of action, ib.
notice of unsoundness only necessary to recover subsequent expences, ib.
offer of purchaser to sell to another person no bar to action, ib.
when contract may be rescinded, and money had and received maintained, 243.
if the buyer had liberty to return the article in case he disliked, ib.
but not if contract still continues open, ib.
in what cases a former vendor is a witness to prove soundness, 166.
WASTE,
evidence of property in, 15. See *Liberum Tenementum. Variance.*
WATERCOURSE. See *Way.*
evidence in action for diverting, 316.
what use of water gives the right, ib.
WAY,
Public:
right of, proved by reputation, 14.

WAY—*continued.*
verdict between other parties, 42.
usage, 315.
Private:
evidence in action for disturbance of, 315.
twenty years enjoyment evidence of right, ib.
must not be claimed to greater extent than proved, 318.
obstruction or leave asked, evidence to rebut, ib.
WIFE. See *Husband and Wife.*
her liability. See *Coverture.*
Admissions or representations by, when evidence against her husband,
only receivable as part of *res gesta*, 22.
What considered such:
representations at time of elopement, 21.
state of her health, 23.
What not:
by-gone transaction, 21.
acknowledgment of receipt of money earned by her, ib.
or due to her as executrix, ib.
Contract by:
in general binding on husband if living with him, 248.
not so if he has given her money to pay, ib.
if parted from him, not binding unless for necessaries, 249.
not then if she has committed adultery, ib.
Promise by:
does not revive debt due *dum sola*, 21.
To what fact a witness:
cannot prove non-access of husband, 178.
but may that another was connected with her, ib.
Action for harbouring:
when it lies, 354.
wife's representations, when evidence, ib.

WILL,
Of personalty, how proved:
by production of probate, 67
probate conclusive, 68.
unless there has been *bona notabilia*, ib.
competence of testator, 393. See *Insanity*.
Of land:
provision of statute of frauds, 382.
does not extend to copyholds, 382. 457.
nor mere chattel interest, ib.
evidence of will, ib.
1. signing by testator, 383.
2. publication, 384.
3. attestation by witnesses, ib.
needs not be at the same time, or in the presence of each other, ib.
but must be in presence of testator, ib.
what is considered to be, 392.
must all attest the same instrument, 386.
codicil not considered as part of will for this purpose, 387.
but several writings made on same paper may, 388.
the whole will must be present, 389.
4. witnesses credible:
who considered so, 391.
cases and statute on that subject, 153. 155.
What proof required:
sufficient to call one witness, 391.
if he denies execution, all should be called and then contradicted, 392.
heir may prove their dying declarations as to forgery, 130.
when execution presumed, 392.
Revocation of:
Provisions of the statute of frauds:
1. by making a new will, 399.
2. by writing, not itself a will, ib.
3. by cancelling or obliterating, 400.

WILL—*continued.*
4. by marriage and birth of a child, 402.
quære, whether parol evidence admissible to rebut intention, 120. 402.
5. by taking a new estate, 403.
Republication of:
when it passes newly acquired property, 403.
or restores an old will, 405.
Will of copyholds:
not within statute of frauds, 382. 457.
what a sufficient will, 457.

WITNESS,
(A.) Who may be (in general),
children who have sense of religion, 127.
lunatic during lucid interval, ib.
deaf and dumb persons, if otherwise of sense and understanding, 128.
persons convicted of offences not rendering them infamous, 129.
persons convicted of infamous offences but afterwards pardoned, 131.
what offences are considered as rendering them infamous, 130.
what evidence required of pardon, 131.
of actual, ib.
burning in hand, 132.
whipping, fine or transportation, ib.
not necessary in case of clergymen or peers, 131.
nor will transportation restore after sentence of death, 132.
excommunicated persons, 137.
infidels, who are not atheists, 136.
Quakers in civil cases, 140.
but not in criminal, ib.
what considered as a criminal prosecution, ib.
accomplices or joint trespassers not joined, 136. 142.

WITNESS—*continued.*
defendant against whom no evidence given, or who has suffered judgment by default, 148.
person who has sworn otherwise on former occasion, 136.
person who has been in fact married to prove his marriage void, 177.
(B.) Who may not be (in general),
atheists, 139.
idiots and lunatics, 127.
children without sense of religion, ib.
persons convicted of infamous offences, 129.
what offences deemed infamous, 130.
how conviction to be proved, 132. *Vide ante*, (A.)
(C.) When husband and wife may or may not be witnesses:
in general not witnesses for or against each other, 169.
nor woman who has passed as wife witness for husband, vide *Campbell* v. *Twemlow*, Addenda.
though after divorce, 171.
or for third persons jointly indicted, ib.
nor to give evidence tending to criminate, ib.
but wife may incidentally show that her husband is liable for the debt in action against third person, ib.
Exception to the rule:
where one has offered personal violence to the other, 170.
or where marriage not binding, as in the case of second wife on indictment for bigamy, ib.
or wife carried away, on indictment for forcible abduction, ib.
or wife divorced to prove facts occurring after divorce, ib.
When witnesses on questions of legitimacy of the children:
may be witnesses to deny marriage, or prove its illegality, 177.

WITNESS—*continued.*
so wife to prove illicit connexion, 177.
but not non-access of husband, ib.
What persons may or may not be witnesses on the ground of professional confidence:
barrister, attorney or interpreter employed between them and the client, not to reveal confidential communications, 173.
What confidence considered professional:
not acts to which attorney is a party, 173.
nor act done by client in his presence, ib.
nor where attorney acts merely as steward or agent, 174.
nor what client tells the attorney after the cause ended, 175.
a physician consulted by a patient not bound to secrecy, ib.
nor clergyman to whom he makes confession of his sins, ib.
(D.) What persons are or are not excluded on account of interest:
General rule,
the interest must be either a certain benefit or injury by the event of the cause; or the question such that the record would be evidence for or against the witness in another action, 141.
mere hope or expectation of benefit no objection, ib.
a joint trespasser is a witness for the plaintiff, 136. 142.
a person guilty of like offence for the defendant, 141.
the wife of a person convicted is a witness for the prosecutor, 142.
1. in general party in the cause no witness for himself, 145.
unless by consent, ib.
nor the partner till released by him to prove that the witness only is liable, 150.
nor informer who has part of penalty, 148.

WITNESS--*continued.*

aliter in cases of rewards for apprehending felons, 148.

but when governors of a charity are defendants in corporate character, the individuals may be witnesses, 145.

or other corporators not beneficially interested, ib. See Digest, Letter (C.)

party robbed a witness for himself on the statute of Winton, 146.

and hundredors for defendant, ib.

defendant's deposition evidence for him when afterwards sued for malicious prosecution, 147.

persons made defendants without cause and against whom no evidence given, witnesses for other defendants, 148, 149.

so defendant who has suffered judgment by default, ib.

but not for plaintiff to charge the other in *assumpsit*, ib.

2. a mere formal title, without actual interest, forms no objection, 151.

as guardian in socage, ib.

trustee, ib.

aliter of guardian on record who is liable for costs, ib.

tenant at will to support landlord's title, ib.

or defeat ejectment, ib.

aliter if tenant from year to year, ib.

3. a mere imaginary interest or supposed honorary obligation no objection, 151, 152.

4. witnesses of necessity admitted though really interested, 181.

as factors, servants, porters, &c. 147. 160, 161.

but not servants to show the propriety of their own conduct in action charging them with negligence, 161.

corporators in whom alone resides the right of making freemen, 158.

persons giving bribes at elections, 168.

WITNESS — *continued.*

5. Persons indifferent as having interests both ways:
inhabitants of county on indictment for not repairing bridge, 149.
such inhabitants now made witnesses in all cases, 157.
party to a bill in action against another party to prove it void or paid, 150. 161.
but not to prove property in himself, ib.
person who has borrowed money for another to show his authority, ib.
master of ship who has ordered provisions to show liability of owner, ib.
how far the court will weigh the conflicting interests, see the cases, 158.

6. In cases of criminal prosecutions:
in general party defrauded may be a witness on criminal prosecution, 142.
exception in the case of indictment for forgery, 144.
does not extend to *actions* in which that question arises, ib.
digest of cases on this subject, 164.

7. the witness cannot disqualify himself by making himself interested without the act of the party, as by laying wager on event of cause, 153.
or becoming bail, 180.

8. in all cases of interest the witness may be rendered competent by a release to or from him, or a tender of it, 153.

9. persons may be examined where the evidence is against their own interest, 154.
and compelled to answer though they charge themselves with a debt, 178.
but not to charge themselves with a crime or disgraceful action, as being father of bastard child, or author of libel, 179.

Digest of cases as to interested witnesses:
corporators and others on public questions, 158.

WITNESS—*continued.*
servants and agents, 160.
in cases of bankruptcy and insolvency, 163.
on indictments for forgery, 164.
persons answerable over or who have themselves contracted, 166.
persons themselves liable charging others, or coming to claim property in themselves, 168.
(E.) What number necessary:
one in general sufficient, 9.
so in high treason where overt act charged is a direct attempt on the life of the king, 11.
or for counterfeiting coin, signet, privy seal, great seal, or sign manuel, ib.
Two required,
in other cases of high treason, 10.
petit treason, ib.
perjury, ib.
(F.) How examined:
1. on oath, 11.
what act of party will dispense with this, 11. 145,
in what form the oath to be administered, 139.
what questions to be asked a witness respecting the form of swearing, 140.
2. Mode of examination:
on the *voir dire*, 182.
may prove instruments disqualifying him, or restoring his competency, ib.
when examined apart, 184.
Original examination:
not to be asked leading questions, 183.
exception to this rule, ib.
how he may assist his memory by referring to written papers, 195.
when he may be examined as to matters of opinion, ib.
Cross-examination:
may be asked leading questions, 183.
but not as to written documents, ib.

WITNESS—*continued.*
or as to criminal or disgraceful conduct not connected with the cause, 183.
modern cases on this subject, 134.
how far subject to contradiction on this point, ib.
necessary in all cases to lay foundation for contradiction, 191.
how far as to conspiracy to defeat justice, 8.
Re-examination of,
not to be leading, 194.
not to be asked what said by third person, to whom witness on cross-examination stated he told certain things, 195.
Discrediting of,
how far on their own examination. See Cross-examination, *supra.*
general evidence to discredit, 129.
cannot be generally discredited by party calling, 129.
but he may contradict them as to facts, ib.
how far proof of conspiracy amongst the witnesses evidence for this purpose, 8.
(G.) Compelling their attendance and their privileges:
subpœna, 197.
habeas corpus, 198.
remedy for expences, 197.
protection from arrest, 198.
from answering questions criminating or disgracing themselves, 133. 178.
but not from answering such questions as only render them liable to civil suit or pecuniary loss, 179.

WORDS. See *Slander.*

WORK AND LABOUR,
where the want of skill or attention furnishes a defence to the action, 263.

WRITS. See *Return.*
how proved, 50.
when considered as the commencement of the action or otherwise, 31.
day of issuing, how proved, ib.
when necessary to show continuance, 291.
how continuance proved, ib.
WRITTEN EVIDENCE,
when explainable by parol. See *Ambiguity.*

ADDENDA.

The reader is requested to refer to the following cases, (which have been determined, for the most part, while the work has been at press), in the pages prefixed to the several paragraphs.

pages 25 and 169.—*Campbell* v. *Twemlow*, 1 Price 81. The Court of Exchequer inclined to the opinion, that a woman who had passed as the wife of a man, but was not so, could not be examined as a witness for him; and the Chief Baron mentioned an instance wherein Lord *Kenyon*, when chief justice of *Chester*, so ruled in a capital case.

p. 251.—*Goss* v. *Watlington*, C. P. Michaelmas, 2 Geo. 4. The court held that, in an action against a surety, who had entered into a joint bond with his principal on his appointment to a public office, conditioned for payment of all monies received, and further, that the principal should from time to time enter into certain books all monies by him received; entries in such books by the principal, were after his death evidence against the surety; but they gave no opinion whether such entries would have been evidence without such a special clause in the condition, or with it in his life-time. They held that receipts given by him were not evidence.

page 126.—In *Smith* v. *Doe* dem. *Earl of Jersey*, 2 Br. & B. 473; 7 Price, 281, S. C. the mode of

reserving rent in leases, granted previous to the creation of a power, was deemed evidence as to what was the usual and accustomed rent; and the like evidence was admitted and much relied on in *Doe* dem. *Earl of Shrewsbury* v. *Wilson*, K. B. Hilary, 2 & 3 Geo. 4.

page 401.—In *Winson* v. *Pratt*, 2 Brod. & B. 650, the Court of Common Pleas determined that a will was not concelled by an unfinished alteration by the testator.

p. 318.—The same court held, that when rights had been exercised on land in possession of tenant for twenty years, the presumption was, that the owner had knowledge of it, and that the *onus* lay upon him to prove the contrary. *Gray* v. *Bond*, ibid. 667.

p. 263.—A lessee took a mansion-house and farm, with the exclusive liberty of sporting over all the lands within the manor, at the rent of £.450; the lessor not having the possession of all the land, the tenant was warned off great part, and it was held, that the jury might give damages only to the value of the farm and house, without reference to the rent reserved. *Tomlinson* v. *Day*, ibid. 680.

p. 163.—Assignee of bankrupt who has released his claim, is a witness to prove petitioning creditor's debt. *Tomlinson* v. *Wilkes*, ibid. 397.

p. 14.—In the proof of a pedigree, the dying declarations of *A.* as to the relationship of the lessor of the plaintiff to the person last seised, are not evidence. *Doe* dem. *Sutton* v. *Ridgway*, 4 B. & A. 53.

p. 112.—A testator by his will devised to *Mathew W.* his brother, and *Simon W.* his brother's son, a certain

certain estate; it appeared that the testator had three brothers, each of whom had a son of the name of *Simon*, living at the time of the testator's death. Held that the proof of this fact did not raise any latent ambiguity in the will, so as to let in parol evidence of declarations of the testator as to the person intended; it being clear that the person intended was *Simon* the son of *Mathew*. *Doe* dem. *Westlake* v. *Westlake*, ibid. 57.

page 304.—On an information for writing, composing, and publishing a libel in the county of *L.* it appeared that the defendant, on the 22d August, wrote and composed the libel in *L.*, and that he was seen in *L.* on that and the following day. On the 24th the libel was delivered in the county of *M.*, (100 miles off) by *A.* to *B.*, being inclosed in an envelope addressed to *A.*, containing written directions to *A.* to forward the libel to *B.*, by whom it was subsequently published in *M.* The envelope was open; and it was not proved that there was on it any trace of a seal or post-mark. *A.* was not called on the trial as a witness by either party; nor was it proved that he was a resident, or had been about that time in *L.* Held, by three justices, (dissentiente *Bayley*, J.) that this was evidence on which the jury might properly be left to presume that the libel was delivered open to *A.* in *L.*

Held, also, by three justices, (*Bayley*, dubitante), that a delivery at the post-office in *L.* of a sealed letter, enclosing a libel, is a publication of the libe in *L.* Held, also, by three justices, (*Bayley*, J. dubitante) where a defendant writes and composes a libel in *L.* with the intent to publish, and afterwards publishes it in *M.* that he may be indicted for a misdemeanor in either county.

And, *per totam curiam*, where a libel imputes to others the commission of a triable crime, held, that evidence

evidence of the truth of it is inadmissable. Held, also, where in summing up, the judge told the jury that the intention was to be collected from the paper itself, unless explained by the mode of publication, or other circumstances; and that, if its contents were likely to excite sedition, &c. defendant must be presumed to intend that which his act was likely to produce; and that, if they found such to be the intent, he was of opinion it was a libel; and that they were to take the law from him, unless they were satisfied that he was wrong, that this was a correct mode of leaving the question to the jury under 32 Geo. 3, c. 60, s. 1.

Qu. Whether the writing and composing a libel with intent to publish, but not followed by publication, be an offence. The *King* v. *Sir F. Burdett*, 4 B. & A. 95.

page 323.—In trespass, the declaration was for taking goods, chattels and effects; held that the plaintiff might recover the value of fixtures under these words. *Pitt* v. *Shew*, 4 B. & A. 206.

p. 358.—In assumpsit, by the provisional assignee of a bankrupt, defendant pleaded the general issue. Held that the fact of the bankrupt's estate having been assigned by the provisional assignee to the new assignee, between the time of issuing the latitat and the delivery of the declaration, is no ground of nonsuit on a plea of non-assumpsit. *Qu.* Whether it would have been an answer to the action if specially pleaded. *Page* v. *Bauer*, 4 B. & A. 345.

p. 101.—Entries in a steward's book above thirty years old, and coming from the proper custody, are admissible in evidence without proving the handwriting of the steward. *Semble*, that the rule extends to

to all written documents coming from the proper custody. *Wynne*, Bart. v. *Tyrwhitt*, 4 B. & A. 376.

page 169.—In trover by *A.* against *B.*, *C.* is a competent witness to prove property in himself. *Ward* v. *Wilkinson*, 4 B. & A. 410.

p. 379.—The fact of a tenant for life not being seen or heard of for fourteen years by a person residing near the estate, although not a member of the family, is *primâ facie* evidence of the death of the tenant for life. Doe dem. *Lloyd* v. *Deakin*, 4 B. & A. 433.

p. 272.—A party on being asked for payment of his attorney's bill, admitted that there had been such a bill, but stated that it had been paid to the deceased partner of the attorney, who had retained the amount out of a floating balance in his hands.

Qu. Whether, in order to take the case out of the statute of limitations, evidence is admissible to show that the bill had never in fact been paid in this manner.

Semble, that such evidence is admissible, if at all, only where the defendant states the debt to be discharged by particular means, to which he refers with precision, and where he has designated the time and mode so strictly, that it is impossible it could be discharged in any other manner than that specified. *Beale* v. *Nind*, 4 B. & A. 568.

p. 342.—Upon a parol demise, rent to take place from the following Lady-day, evidence of the custom of the country is admissible to show that by "Lady-day" the parties meant "Old Lady-day." Doe dem. *Hall* v. *Benson*, B. & A. 588.

page 432.—In consequence of the decision of *Rowe* v. *Young*, referred to in this page, the following statute has been passed:

1 & 2 Geo. 4, c. 78.—An Act to regulate acceptance of Bills of Exchange.

Whereas according to law, as hath been adjudged, where a bill is accepted payable at a bankers, the acceptance thereof is not a general but a qualified acceptance: And whereas a practice hath very generally prevailed, among merchants and traders so to accept bills, and the same have among such persons been very generally considered as bills generally accepted, or accepted without qualification: And whereas many persons have been and may be much prejudiced and misled by such practice and understanding, and persons accepting bills may relieve themselves from all inconvenience by giving such notice as hereinafter mentioned of their intention to make only a qualified acceptance thereof; "Be it therefore enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that from and after the first day of August now next ensuing, if any person shall accept a bill of exchange, payable at the house of a banker, or other place, without further expression in his acceptance, such acceptance shall be deemed and taken to be, to all intents and purposes, a genera acceptance of such bill; but if the acceptor shall in his acceptance express that he accepts the bill payable at a banker's house, or other place only, and not otherwise or elsewhere, such acceptance shall be deemed and taken to be, to all intents and purposes, a qualified acceptance of such bill, and the acceptor shall not be liable to pay the said bill, except in default

fault of payment, when such payment shall have been first duly demanded at such banker's house or other place".

II. And be it further enacted, that from and after the said first day of August no acceptance of any inland bill of exchange shall be sufficient to charge any person, unless such acceptance be in writing on such bill, or if there be more than one part of such bill on one of the said parts.

THE END.

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ERRATA.

Page 14, note, l. 23, *after* " Wright," *refer to* Rex *v.* Cotton, 3 Campb. 444.

— 16, l. 4, *for* " impressed," *read* " pressed."

— ib. l. 24, *for* " laid," *read* " tried."

— 86, in two places, *for* " Chartalary," *read* " Chartulary."

— 201, margin, *strike out* " and post Appendix."

— 151, margin, *for* Goodtitle dem. Forbes, *read* " dem. Fowler."

— 184 to 192 inclusive, head of margin, *for* Examination, *read* " Cross-examination."

— 230, margin, N° 4, read the authorities referred to thus, (viz.) " Lion *v.* Lamb, Fell's Law of Mercantile Guarantees, 36, Appendix. Saunders *v.* Wakefield, 4 B. & A. 595; and Jenkins *v.* Reynolds, as already cited."

— 237, marginal reference, *for* " 219," *read* " 221."

— 372, margin, *for* " 6 T. Rep. 324," *read* " 384."

— 450, note, *for* " stat. 48 Geo. 3," *read* " 43 Geo. 3."

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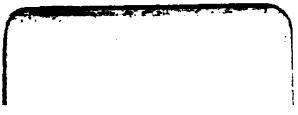
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